77-1829

No.

Supreme Court, U. S.
FILED
JUN 23 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

GRIFFIN B. BELL, ET AL., PETITIONERS

*v.*

LOUIS WOLFISH, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

WADE H. MCCREE, JR.,
*Solicitor General,*

JOHN C. KEENEY,
*Acting Assistant Attorney General,*

KENT L. JONES,
*Assistant to the Solicitor General,*

SIDNEY M. GLAZER,
KATHLEEN A. FELTON,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Constitutional and statutory provisions involved | 3 |
| Statement | 4 |
| Reasons for granting the writ | 15 |
| Conclusion | 42 |
| Appendix A | 1a |
| Appendix B | 38a |
| Appendix C | 40a |
| Appendix D | 42a |
| Appendix E | 70a |
| Appendix F | 74a |
| Appendix G | 200a |


## CITATIONS

Cases:


| | |
|---|---|
| *Bell* v. *Manson*, 427 F. Supp. 450 | 38 |
| *Bijeol* v. *Benson*, 404 F. Supp. 595 | 38 |
| *Bonner* v. *Coughlin*, 517 F.2d 1311 | 39 |
| *Campbell* v. *McGruder*, No. 75-1350, decided March 30, 1978 | 15, 19, 23, 28, 29 |
| *Dandridge* v. *Williams*, 397 U.S. 471 | 23, 29 |
| *Daugherty* v. *Harris*, 476 F.2d 292, certiorari denied, 414 U.S. 872 | 38 |
| *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392 | 8-9, 13, 21 |

Cases—Continued


| | Page |
|---|---|
| *Duran* v. *Elrod*, 542 F.2d 998 | 19, 26 |
| *Feeley* v. *Sampson*, 570 F.2d 364 | 15, 18, 22, 23, 29, 39 |
| *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 | 38 |
| *Griswold* v. *Connecticut*, 381 U.S. 479 | 22, 28 |
| *Hampton* v. *Holmesburg Prison Officials*, 546 F.2d 1077 | 19 |
| *Hodges* v. *Klein*, 412 F. Supp. 896 | 38 |
| *Hoitt* v. *Vitek*, 361 F. Supp. 1238 | 39 |
| *Jackson* v. *Indiana*, 406 U.S. 715 | 24 |
| *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 | 18, 23, 24, 25, 26, 31-32, 34, 35, 37, 41 |
| *Lanza* v. *New York*, 370 U.S. 139 | 28, 32, 39, 41 |
| *Main Road* v. *Aytch*, 565 F.2d 54 | 18, 31 |
| *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245 | 24 |
| *Nebbia* v. *New York*, 291 U.S. 502 | 22 |
| *Newman* v. *State of Alabama*, 559 F.2d 283 | 12 |
| *Padgett* v. *Stein*, 406 F. Supp. 287 | 18 |
| *Patterson* v. *Morrisette*, 564 F.2d 1109 | 21 |
| *Pell* v. *Procunier*, 417 U.S. 817 | 23, 24, 26, 31, 32, 36, 37, 40 |
| *Penn El* v. *Riddle*, 399 F. Supp. 1059 | 38 |
| *Procunier* v. *Martinez*, 416 U.S. 396 | 17, 24, 31, 32 |
| *Rhem* v. *Malcolm*, 507 F.2d 333 | 9, 13, 22 |
| *Roe* v. *Wade*, 410 U.S. 113 | 28 |
| *Shapiro* v. *Thompson*, 394 U.S. 618 | 21 |
| *Shelton* v. *Tucker*, 364 U.S. 479 | 21 |
| *Smith* v. *Shimp*, 562 F.2d 423 | 41 |
| *Tate* v. *Short*, 401 U.S. 395 | 21 |




Cases—Continued


| | Page |
|---|---|
| *Taylor* v. *Sterrett*, 532 F.2d 462 | 31 |
| *Tinker* v. *Des Moines School District*, 393 U.S. 503 | 32 |
| *United States* v. *Hearst*, 563 F.2d 1331 | 31 |
| *United States* v. *Park*, 521 F.2d 1381 | 39-40 |
| *United States* v. *Savage*, 482 F.2d 1371, certiorari denied, 415 U.S. 932 | 39 |
| *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 | 22 |
| *Woods* v. *Daggett*, 541 F.2d 237 | 38 |


Constitution and statutes:


| | |
|---|---|
| United States Constitution: | |
| First Amendment | 10, 18, 21, 23, 32, 36 |
| Fourth Amendment | 3, 11, 32, 39, 41 |
| Fifth Amendment | 3 |
| Due Process Clause | 12, 15, 17, 18, 19, 21, 22 |
| Sixth Amendment | 14 |
| Eighth Amendment | 3, 9, 11 |
| Administrative Procedure Act, 5 U.S.C. 701(a)(2) | 12 |
| 18 U.S.C. 3041 | 3 |
| 18 U.S.C. 4042 | 4, 9 |
| 18 U.S.C. 4081 | 9 |


Miscellaneous:


| | |
|---|---|
| Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 Yale L.J. 941 (1970) | 21 |

# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

No.

GRIFFIN B. BELL, ET AL., PETITIONERS

*v.*

LOUIS WOLFISH, ET AL.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

The Solicitor General, on behalf of the Attorney General of the United States, the Director of the Bureau of Prisons, and the Warden of the Metropolitan Correctional Center, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-37a) is reported at 573 F.2d 118. The opinions of the district court (Apps. F and G, *infra*,

pp. 74a-225a) are reported at 428 F. Supp. 333 and 439 F. Supp. 114.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 38a-39a) was entered on January 24, 1978. On April 14, 1978, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 24, 1978. On May 15, 1978, Mr. Justice Marshall further extended the time for filing a petition for a writ of certiorari to and including June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that every "restriction and deprivation" imposed on persons detained in federal custody pending trial on criminal charges ("pretrial detainees") must be justified by a "compelling necessity."

2. Whether the housing provided to pretrial detainees at the Metropolitan Correctional Center is reasonable in light of valid governmental objectives and is constitutionally sufficient.

3. Whether the governmental interest in maintaining jail security and order justifies rules that (a) prohibit receipt at the jail of packages containing items of food or personal property; (b) prohibit receipt at the jail of books and magazines that are not mailed directly from publishers; (c) require inmates



to expose body cavities for visual inspection as part of the search conducted after contact visits with persons from outside the detention center; and (d) authorize routine inspections of the rooms of pretrial detainees in their absence.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. 3041 provides in part:

> For any offense against the United States, the offender may, by any justice or judge of the

United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of the common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * *

18 U.S.C. 4042 provides in part:

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States * * *.

## STATEMENT

1. The federal Metropolitan Correctional Center (MCC) is located in New York City adjacent to the Foley Square courthouse. The primary objective of the MCC is to house persons who are being detained in custody prior to trial for federal criminal offenses



in the Southern and Eastern Districts of New York and the District of New Jersey. In addition, the MCC houses some convicted inmates who are awaiting sentencing or transportation to federal prison or who are serving their sentences in a service capacity at the MCC (App. A, *infra*, pp. 4a-5a; App. G, *infra*, pp. 200a-202a).

The MCC was constructed in 1975 to replace the aging federal West Street facility, which had been in use in New York City since 1928. At the time the MCC was designed, it was intended to incorporate the most advanced and innovative features of modern correctional design. As the court of appeals stated, "it represented the architectural embodiment of the best and most progressive penological planning" (App. A, *infra*, p. 4a). The key design element of the facility is the modular or unit concept, in which a number of self-contained residential units replace the traditional cellblock jail construction. Each unit consists of approximately 48 private rooms (or six larger dormitory rooms) adjoining or opening onto common multipurpose rooms to which the detainees have free daytime access.[1] The common areas include facilities for food preparation and dining, receiving visitors, recreation and education. By eliminating any need for frequent, scheduled movements of detainees into different functional areas of the facility, it was expected that the modular design would "humanize staff-

[1] The period of free access varies from 16 to 19 hours per day (App. A, *infra*, p. 4a).

inmate relations and provide a more 'homelike' atmosphere, affording inmates greater privacy and freedom than jails of earlier construction" (App. A, *infra*, pp. 4a-5a).[2]

2. Initial plans for the MCC provided for a capacity of approximately 400 inmates, or an increase of one-third over the West Street facility (A. 2376-2377).[3] These plans were later revised and expanded so that at the time the MCC opened the planned capacity was 449 inmates, or approximately 50 percent greater than at the old jail (App. A, *infra*, p. 6a).

Just prior to the opening of the MCC, the number of persons committed to pretrial custody began to rise at an unprecedented rate (*ibid.*). The Bureau of Prisons employed several measures in an effort to manage the unexpected flow of persons committed to the MCC. The Bureau located persons awaiting deportation proceedings at other federal facilities and eliminated the planned community treatment center, or "half-way house," at the MCC (A. 1657).[4] The Bureau also arranged to expedite the transfer of in-

[2] As the court of appeals noted, the residential atmosphere of the facility is enhanced by carpeting and by clear exterior windows without bars (App. A, *infra*, p. 5a).

[3] "A." refers to the Joint Appendix in the court of appeals. The population at the West Street facility had been 285-300 inmates (A. 2122, 2375).

[4] These changes provided 108 additional spaces for the housing of pretrial detainees and convicted inmates at the MCC (A. 1266-1267, 2501-2502, 2521-2522).



mates to prisons upon sentencing and contracted with private half-way houses for additional bedspace (A. 1483-1485, 1188).

Despite these efforts, however, the inmate population at the MCC began to rise above its planned capacity within a short time after its opening. In November 1975, in order to provide sleeping space for this increased number of inmates, the MCC began to replace single beds with bunk beds in some of the residential rooms used to house pretrial detainees (A. 124-125).[5] Similarly, the Bureau installed bunk beds in the dormitory rooms in order to double the capacity of those areas (A. 1184-1185). During brief periods of unusual influx of persons into the facility, a small number of detainees and inmates were provided with temporary sleeping space in the common areas of the modular units (A. 2528, 1040-1041). These persons were transferred to residential rooms as soon as space became available (A. 2529).

3. On November 28, 1975—less than four months after the MCC was opened—Louis Wolfish initiated this action by filing a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of New York. The petition alleged that overcrowding and other conditions at the MCC

[5] The district court correctly noted that 121 of the 389 residential rooms had been "designated" for double-occupancy as of the time of its decision (App. G, *infra*, p. 203a; A. 177). The number of rooms actually housing two inmates, however, did not exceed 73, and, of these, only 35 were rooms in units designated to house pretrial detainees (A. 124-125, 82).

made the confinement at that facility unconstitutional.[6] The district court subsequently certified the case as a class action on behalf of all persons confined at the MCC (App. A, *infra*, p. 7a). The litigation has thus simultaneously implicated the rights of both pretrial detainees and convicted inmates with regard to the conditions of their confinement.

In its two opinions and several orders in this case, the district court declared unlawful and enjoined no fewer than 20 separate aspects of the MCC administration. In analyzing the various challenges to conditions of confinement at the MCC, the district court applied the following legal standards:

(i) Since detainees must be presumed innocent until proven guilty, and since the sole justification for their confinement is custody and not punishment, the Due Process clause requires that "any deprivation or restriction of * * * rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity" (App. F, *infra*, p. 89a, citing *Detainees of Brook-*

[6] The petition, as amended, alleged a multitude of constitutional violations at the MCC. These included, *inter alia*, overcrowding; undue length of confinement; monitoring of personal mail; improper strip searches after contact visits; inadequate visiting hours; inadequate access to legal materials; inadequate recreational, educational and employment opportunities; inadequate telephone service; restrictions on religious freedoms; restrictions on the purchase and receipt of items of personal property; inadequate and unsanitary food; objectionable uniforms; poor ventilation; insufficient staff; unannounced transfers; and inadequate services for non-English speaking inmates (App. A, *infra*, pp. 7a-8a and n. 7).



*lyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (C.A. 2); *Rhem* v. *Malcolm*, 507 F.2d 333, 336-337 (C.A. 2));

(ii) The Bureau of Prisons' enabling legislation creates duties to "care" for prisoners and to provide prisoners with "suitable quarters," 18 U.S.C. 4042, 4081, and these duties are enforceable to prevent "arbitrary" and "capricious" maladministration (App. F, *infra*, pp. 83a-84a); and

(iii) The Eighth Amendment requires that convicted inmates at the MCC be treated equally with detainees in terms of essential living conditions because it would be "cruel and unusual" to treat them as an "inferior minority" at the MCC (App. G, *infra*, p. 213a);

Applying these standards, the court held unlawful and enjoined the double-bunking of pretrial detainees in a single cell (App. G, *infra*, pp. 207a-212a) and the doubling of sleeping facilities in the dormitory rooms (App. F, *infra*, pp. 121a-126a). The court found that the crowding resulting from the use of bunk beds in these areas abridged the inmates' rights to privacy and decent accommodations, was not justified by any sufficient governmental interest, and was therefore unconstitutional (App. F, *infra*, pp. 116a-121a; App. G, *infra*, p. 211a).[7]

[7] The court similarly enjoined the MCC from providing even temporary sleeping facilities in the common areas at the detention center (App. F, *infra*, p. 116a). The use of double-bunking procedures for convicted inmates at the MCC was stricken under the Eighth Amendment, on the theory that it would be cruel and unusual to treat prisoners as an "inferior minority" at the facility (App. G, *infra*, p. 213a).

The court also held unlawful under the Due Process Clause and Bureau of Prisons legislation several other aspects of confinement at the MCC that the court found to be unduly restrictive.[8] For example, the court enjoined MCC regulations concerning limitations on visits from family, friends, attorneys and co-defendants (App. F, *infra*, pp. 129a-140a); limitations on telephone service and commissary privileges (*id.* at 111a-115a, 140a-143a); limitations on the use of the visiting room bathroom (*id.* at 134a-135a); prohibitions against receipt of packages containing food and items of personal property by inmates (*id.* at 162a-166a); and requirements for the use of an inmate uniform (*id.* at 166a-169a). The court also affirmatively required the MCC to increase the materials available in a law library at the facility (*id.* at 102a-106a) and enjoined the MCC from retaining any detainee or inmate at the facility for a period in excess of 60 days without the inmate's written consent (*id.* at 96a-98a).

In addition to the holdings based on the Due Process Clause and the Bureau of Prisons legislation, the district court found other practices at the MCC to violate specific constitutional guarantees applicable to both pretrial detainees and convicted inmates. The court held that the First Amendment rights of persons confined at the MCC were violated by the random inspection of letters mailed out of the facility, and by

[8] The district court did not indicate in each case whether it was relying on a statutory or constitutional basis for its various holdings.



the MCC rule that prohibits receipt of any books and magazines that are not mailed directly from "publishers only." The court refused to accept the security justifications argued in support of these two practices (App. G, *infra*, pp. 215a-216a, 221a-222a). The court also held that the requirements that (i) detainees remain outside their rooms during routine inspections,[9] and (ii) detainees and convicted inmates expose their body cavities for a visual inspection following contact visits, are not justified by a sufficient governmental interest in security or prison administration. The court held that the former of these two practices violates the retained right of privacy of pretrial detainees, and the latter constitutes an unreasonable search in violation of the Fourth Amendment (App. F, *infra*, pp. 147a-157a).

4. On appeal, the Second Circuit largely affirmed the district court's holdings under the Due Process Clause, but rejected the district court's reliance on the Eighth Amendment and the Bureau of Prisons legislation.

With regard to the Eighth Amendment, the court of appeals stated that

> [a]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety.

[9] The court did not strike the MCC rule requiring convicted inmates to vacate their rooms during routine inspections (App. F, *infra*, p. 157a).

App. A, *infra*, p. 13a, citing *Newman* v. *State of Alabama*, 559 F.2d 283, 291 (C.A. 5). The court of appeals rejected the district court's reasoning that it is cruel and unusual to house prisoners in conditions worse than detainees are housed in the same facility, and remanded for the district court to determine whether the housing for convicted inmates at the MCC was "adequate" (App. A, *infra*, pp. 19a-20a).

With regard to the enabling legislation of the Bureau of Prisons, the court of appeals noted that these statutes confer broad discretion on the Attorney General to safekeep and care for inmates. The court concluded that the administration of federal prisons constitutes "agency action * * * committed to agency discretion by law" and is therefore exempted from judicial review by the Administrative Procedure Act, 5 U.S.C. 701(a)(2) (App. A, *infra*, pp. 14a-15a). The court of appeals therefore reversed the district court's determination that certain conditions of confinement at MCC violated the Bureau of Prisons' enabling legislation.[10]

With regard to the scope of protection afforded pretrial detainees by the Due Process Clause, the court of appeals indicated that the district court had articulated the correct standard but had misapplied the standard in some situations. The court reiterated the

[10] On this basis, the court of appeals reversed the district court's holdings that the bathroom in the visiting area must be kept unlocked, and that prison authorities must make local and long-distance telephone service available to MCC inmates (App. A, *infra*, pp. 15a-17a).



Second Circuit's view that pretrial detainees may be subjected to "only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration'" (App. A, *infra*, p. 12a, quoting *Rhem* v. *Malcolm*, *supra*, 507 F.2d at 336; *Detainees of the Brooklyn House of Detention* v. *Malcolm*, *supra*, 520 F.2d at 397. The court stated that neither fiscal necessity nor administrative convenience could constitute a compelling justification for intrusive regulation (App. A, *infra*, p. 12a). At the same time, however, the court indicated that where the institution's "legitimate interests in security" are involved, the court should be deferential and not "second-guess the expert administrators on matters on which they are better informed" (*id.* at 12a-13a).

The court evidenced little difficulty in applying this complex standard. For example, on the issue of double-celling of detainees, the court concluded simply that "no showing of compelling necessity" had been made to justify the invasion of personal privacy involved (*id.* at 17a). Applying the same analysis, the court held that double-bunking in the dormitory areas was unjustified, but remanded for the district court to determine "whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories" (*id.* at 21a, 23a).[11]

[11] The court also remanded to the district court for it to determine whether, in light of changed conditions resulting from this litigation, the nature of confinement at the MCC is now sufficiently tolerable that the order limiting incarceration of all detainees at the MCC to a period of less than 60 days should be rescinded (App. A, *infra*, pp. 24a-25a).

Several other aspects of confinement at MCC were similarly held to constitute impermissible "restrictions and privations" that were not justified by compelling governmental interests. Specifically, the court of appeals held that there was no sufficient justification for the MCC policy prohibiting receipt of packages containing food and personal items by inmates (*id.* at 32a-33a). The court also determined that governmental security interests did not justify the MCC rules that prohibit detainees from observing searches of their rooms and that require detainees and convicted inmates to expose their body cavities during searches conducted after contact visits (*id.* at 29a-32a). Finally, the court rejected asserted security concerns and upheld the district court's order enjoining the random inspection of outgoing mail and the "publisher only" rule that limits the receipt of books and magazines by inmates at the MCC (*id.* at 26a-29a).[12]

The court of appeals reversed the ruling of the district court that inmates must be permitted to possess typewriters for their personal use in their rooms. The court of appeals stated that the district court had improperly rejected "the MCC's judgment that * * * particular problems of security, storage, and theft [would arise] from inmates' ownership of typewrit-

[12] Relying on the Sixth Amendment right to counsel and the due process right of prisoners to have access to the courts, the court of appeals also affirmed the orders of the district court requiring an expansion of the MCC library and of visiting hours for attorneys (App. A, *infra*, pp. 35a-36a).



ers * * *" (*id.* at 33a). The court of appeals also reversed the district court's determination that inmates should not be required to wear uniforms, holding (*id.* at 34a) that

> the MCC has demonstrated a legitimate security interest in readily identifying inmates that outweighs the inmates' understandable desire to control their own appearance.

## REASONS FOR GRANTING THE WRIT

This case raises several important questions concerning the rights of pretrial detainees to challenge the conditions of their confinement. The court of appeals has articulated a requirement under the Due Process Clause that every restriction imposed on pretrial detainees during confinement must either be inherent in the concept of confinement or be supported by a "compelling necessity." This constitutional standard has been expressly rejected by the First Circuit in *Feeley* v. *Sampson*, 570 F.2d 364, 371, which requires instead that a restriction imposed during confinement be shown to have a "reasonable relationship" to valid governmental objectives. The District of Columbia Circuit, in *Campbell* v. *McGruder*, No. 75-1350, decided March 30, 1978, has elaborated still a third due process standard that is based on considerations different from those relied on by either the First Circuit or the court of appeals in this case. It is important that this conflict among the circuits be resolved, both because of the significant volume of

litigation concerning the rights of pretrial detainees that has occurred and will continue to arise in the absence of dispositive guidance by this Court, and also because of the substantial practical impact of the decision in this case on the administration of the federal Metropolitan Correctional Center.

Moreover, in its invalidation of several specific restrictions and practices of confinement at the MCC, the court of appeals has rejected the determination of corrections officials that these challenged practices serve the government's compelling interest in maintaining security and order within the facility. In holding these practices to be invalid, the court of appeals failed to comply with decisions of this Court requiring that deference be given to determinations made by correctional officials as to the needs of security and has created a conflict among the courts of appeals as to the validity of these specific institutional practices. In order to resolve this conflict among the courts of appeals, the petition for a writ of certiorari should be granted.[13]

---

[13] The decision of the district court constituted, in our view, an excessive intrusion into the minutiae of administration of the MCC, which the rulings of the court of appeals did much to ameliorate. In general, however, we continue to disagree with virtually all of the determinations of the court of appeals that struck down particular practices of the Bureau of Prisons in administering the MCC. Nevertheless, in order to avoid unduly complicating this Court's task should it elect to grant review in this case, we have not presented for review every adverse ruling. For example, the additional library requirements upheld by the court of appeals are not considered likely to be of significant utility to inmates, on the basis of the Bureau of Prisons' experience stocking libraries at its many institutions around the country, and the Bureau believes that the money expended to meet this requirement could be better spent for inmate welfare in other ways. Moreover, we believe there has been an insufficient showing of need for injunctive relief with regard to attorney visiting hours. In both instances, however, the Bureau has concluded that the adverse impact of the decision is sufficiently localized and limited that review by this Court at the present time is not deemed necessary.

Similarly, we believe that the restriction against random inspection of outgoing mail is not reconcilable with this Court's decision in *Procunier* v. *Martinez*, 416 U.S. 396, 413-414. Nevertheless, the Bureau is independently considering termination of its present mail inspection practices, and we have accordingly determined not to present the issue of the legality of such practices to the Court in this petition.

The Attorney General has established a Federal Corrections Task Force in the Department of Justice. The Task Force is to present to the Attorney General recommendations for national corrections standards and a federal corrections policy regarding conditions of confinement for both sentenced prisoners and pretrial detainees. We will advise the Court in a supplemental filing if any pertinent policy determinations are made by the Attorney General as a result of the Task Force investigation.



1. Prior to 1970, none of the courts of appeals had confronted the question of the nature of the limitation imposed by the Due Process Clause on the conditions of confinement for pretrial detainees. Since that time, however, at least three different constitutional standards have been articulated by the various courts of appeals. The government has argued in this case that in reviewing practices of detention for pretrial detainees under the Due Process Clause, unless a practice abridges a specific, fundamental right guar-

anteed by other provisions of the Constitution, the practice should be upheld if it is reasonably related to the objective of confinement and the inherent needs of the institution for security, order and safety. Furthermore, in determining whether living conditions during confinement are decent and reasonable, consideration should be given to cost, administrative feasibility, and available practical alternatives.

The First Circuit, in *Feeley* v. *Sampson*, *supra*, has articulated a due process analysis that is consistent with the government's position in this case. In *Feeley*, the court held that the Due Process Clause requires the government to accomplish the custodial objectives of pretrial confinement "in a reasonable, and hence a humane, manner." 570 F.2d at 370. The court declined to require a "compelling necessity" or "strict scrutiny" evaluation of challenged institutional restraints that do not affect specific constitutional guarantees, such as the First Amendment. The court stated that an over-broad application of the standard of compelling necessity would fail to give appropriate weight to the several valid governmental objectives in pretrial confinement, and would result in an impermissible second-guessing of institutional determinations made by corrections officials. *Id.* at 371, citing *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 127-128. See also *Main Road* v. *Aytch*, 565 F.2d 54, 57 (C.A. 3); *Padgett* v. *Stein*, 406 F. Supp. 287, 295 (M.D. Pa.).[14]

[14] In situations not involving specific constitutional guarantees, the Seventh Circuit has applied a due process standard similar to that adopted by the First Circuit. See *Duran* v. *Elrod*, 542 F.2d 998, 999, 1001 (C.A. 7) (restrictions must be "reasonably" necessary to secure the governmental interest; various interests, including fiscal constraints, may be considered).



The District of Columbia Circuit has adopted a due process analysis that differs in its critical concepts from that adopted by the First Circuit, but levies essentially similar requirements. In *Campbell* v. *McGruder*, *supra*, the court emphasized that pretrial detainees have a retained liberty interest that "is rooted in the presumption of innocence" (slip op. 13),[15] and that a principal corollary of the presump-

[15] The Third Circuit has expressed substantial doubt as to the relevance of the "presumption of innocence" in establishing substantive restraints on government action under the Due Process Clause.

> We note that some courts have apparently relied upon the "presumption of innocence" in cases involving pretrial detainees. However, we do not believe that principle serves as the source for those substantive rights. Rather, the presumption allocates the burden of proof. It is a principle of evidence, 9 J. Wigmore, Evidence § 2511 (3d ed. 1940), acting as the foundation for the procedural due process requirement of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also Leland* v. *Oregon*, 343 U.S. 790, 802-803, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (Frankfurter, J., dissenting). If the "presumption of innocence" is read literally to apply to all pretrial procedures, it is impossible to justify bail or pretrial detention, both of which are restraints imposed upon an accused despite the presumption. * * *

*Hampton* v. *Holmesburg Prison Officials*, 546 F.2d 1077, 1080 n.1 (C.A. 3).

tion of innocence is the constitutional prohibition against the infliction of any punishment prior to conviction (*id.* at 13-14). The court stated that, in order to assure that the conditions of confinement do not accumulate to effect what amounts to improper punishment (*id.* at 17),

> each restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration. To evaluate these necessities we will look to the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pretrial detention at a feasible cost.

The court stated that a compelling necessity would be required to justify any practice that is "likely to impair a detainee's mental or physical health" (*id.* at 18), or negatively affect the detainee's preparation or presentation of his defense at trial (*id.* at 18-19).

The Second Circuit has formulated a more exacting and less flexible due process standard, which proscribes all "restrictions and privations" inflicted on detainees that are not justified by the "compelling necessity" of detention or the "inherent" concept of confinement (App. A, *infra*, p. 12a). The court has stated that, in evaluating the conditions of confinement, "cries of fiscal necessity * * * [and] administrative convenience" cannot justify institutional privations or restraints (*ibid.*).[16]



The courts of appeals are thus in open disagreement as to the correct standard to be applied in reviewing challenges by pretrial detainees to conditions of confinement under the Due Process Clause. The conflict among the circuits cannot be resolved without the aid of this Court.

b. The due process standard adopted by the court of appeals in this case lacks substantial support in the decisions of this Court.[17] The premise underlying the Second Circuit's rule is that, since a pretrial de-

---

[16] The Fourth Circuit has adopted a standard in these cases that parallels the Second Circuit test in that it severely limits the governmental objectives that may be considered in justification of any restraint on pretrial detainees. *Patterson* v. *Morrisette*, 564 F.2d 1109 (C.A. 4).

[17] The authority from which the Second Circuit has derived its broad "compelling necessity" test is tangential at best. In *Detainees of the Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (C.A. 2), the court found authority for its test in *Shapiro* v. *Thompson*, 394 U.S. 618 (right of interstate travel), *Tate* v. *Short*, 401 U.S. 395 (equal protection violated by additional imprisonment based on inability to pay a fine), and *Shelton* v. *Tucker*, 364 U.S. 479 (teacher's First Amendment rights infringed by a school board policy requiring disclosure of personal associations). These cases fall far short of providing direct support for the Second Circuit's rule.

The other principal authority relied on by the Second Circuit is a law school note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 Yale L.J. 941 (1970). The due process analysis of the Note focuses on cases involving statutory construction of civil commitment legislation, in which the courts inferred a legislative intent to authorize only the "least restrictive" confinement. *Id.* at 949.

tainee must be presumed to be innocent, he may not be deprived of the rights possessed by other citizens except to the extent that such deprivations are justified by compelling governmental necessities (App. A, *infra*, p. 12a; see *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (C.A. 2)).

An initial defect in the analysis of the Second Circuit is that it has never been the law that the government must justify all "restrictions and privations" that it imposes on citizens by a "compelling necessity." Instead, it is the ordinary rule that

> the guaranty of due process * * * demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.

*Nebbia* v. *New York*, 291 U.S. 502, 525; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379. Only where "fundamental" individual rights are infringed has the government been required to show that "compelling" necessities justify the challenged action. See *Griswold* v. *Connecticut*, 381 U.S. 479, 481-486 (citing cases).

The Second Circuit's rule of "compelling necessity" would be justified under the Due Process Clause only if *every* "restriction and privation" imposed on pretrial detainees implicates a fundamental interest protected by the Constitution. But this position would seem difficult to maintain. The initial decision to detain the inmate is itself, of course, a fundamental deprivation of liberty. But such detentions are implicitly authorized by the Constitution and are justified by the governmental interest in controlling crime; furthermore, the prisoner is afforded a hearing prior to commitment. See *Campbell* v. *McGruder*, *supra*, slip op. 10-11; *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369 n. 4. With regard to the conditions of confinement once detention is ordered, it may be that some aspects of confinement implicate interests that the Court has recognized as "fundamental" (*i.e.*, First Amendment freedoms; see *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369). Other "privations" of confinement, however, may more directly impinge only the inmates' understandable desire to live comfortably during detention (*i.e.*, receipt of food packages, typewriter in the cell). This Court has never elevated the individual's interest in economic comfort to the level of a fundamental constitutional interest. See *Dandridge* v. *Williams*, 397 U.S. 471, 484-487.[18] If a literal interpretation were given to the Second Circuit rule—that all "restrictions and privations" imposed during pretrial detention must be justified by a compelling governmental interest—the rule would seem to sweep too broadly.[19]

---

[18] And, of course, an individual's free exercise of rights over his property has not been thought fundamental, but rather subject to reasonable restriction.

[19] Such a broad rule is especially inappropriate in this case because the fact of confinement itself imposes limitations on constitutional rights "which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125. See *Pell* v. *Procunier*, 417 U.S. 817, 822.

In the analogous context of the due process restraints applicable to civil commitment, the Court has stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738. See *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 249-250. This basic requirement of due process is equally applicable in the context of pretrial confinement. In *Procunier* v. *Martinez*, 416 U.S. 396, 404, the Court has emphasized the "Herculean obstacles to effective discharge" of the duties of prison administrators. In the context of pretrial confinement, no less than with convicted prisoners, these duties include maintaining internal order and discipline and securing the institution against unauthorized access or escape. See *ibid.* Considerations of institutional order and security are "peculiarly within the province and professional expertise of corrections officials, and * * * courts should ordinarily defer to their expert judgment in such matters." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128, quoting *Pell* v. *Procunier*, 417 U.S. 817, 827. As the First Circuit has stated in *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369-371 and n. 4, however, a requirement that every aspect of confinement be strictly reviewed to ensure that it directly accomplishes a compelling governmental objective is inherently inconsistent with a proper recognition of the legitimacy of the purpose of confinement and the



deference appropriately due to officials charged with the safe and efficient accomplishment of this difficult task.[20]

Accordingly, here, as in the context of civil commitment, the basic requirement of due process should be that the conditions and practices of confinement be reasonable in light of the valid government objectives in jail administration. *Ibid.*; *Campbell* v. *McGruder*, *supra*, slip op. 17. These objectives include "the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pretrial detention at a feasible cost." *Ibid.* In each challenge to a condition of authorized pretrial confinement under the Due Process Clause, the government must show that the restrictions imposed are justified by these limited purposes and are accomplished in "a reasonable, and hence a humane, manner." *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370, 371.[21]

---

[20] The court of appeals recognized in this case that maintenance of security is a "compelling necessity" of confinement. As discussed at pp. 30-41, *infra*, however, the court of appeals failed to adhere to the requirement in *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, that deference be given to the determination of the needs of security by corrections officials.

[21] We acknowledge that application of this test to pretrial confinement may well require more favorable conditions of detention than are required for convicted prisoners. Restrictions on convicted prisoners may be reasonably related to any valid penological objective such as deterrence of future crime, protection of society, and rehabilitation of the offenders, as well as to institutional concerns for security, order, and admin-

The due process analysis of the court of appeals in this case, however, has too broadly required a "compelling" justification for all "restrictions and privations" of confinement. The court's decision has also too narrowly circumscribed the government interests that may justify, as reasonable, the practices and conditions of pretrial detention.

2. The difficulties inherent in the due process analysis of the court of appeals are illustrated in its evaluation of the practice of using bunk beds in the residential rooms at the MCC. The court of appeals reasoned that this practice is unconstitutional because "the administrators of the MCC have made no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling" (App. A, *infra*, p. 17a). We submit that the court has erred in this conclusion, both in its failure to recognize the legitimate governmental interests in administrative feasibility and fiscal economy, and in its evaluation of the extent to which legitimate personal expectations of privacy have been abridged.

The court stated that the use of a 75-square-foot room to provide sleeping quarters for two inmates affords the inmates "virtually no space for minimal privacy or in which to avoid the other's presence"

---

istrative feasibility. *Pell* v. *Procunier*, *supra*, 417 U.S. at 822-823. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130. The legitimate objectives of confinement are far more limited for pretrial detainees. See *Duran* v. *Elrod*, 542 F.2d 998, 999-1000 (C.A. 7).



(*id.* at 18a). The court relied on testimony from a prior case involving rooms of only 40 square feet in which double-celling of inmates had been accompanied by fights, disagreements, charges of theft and frequent involuntary contact between the inmates (*ibid.*, as amended by Appendix C, *infra*, p. 41a, citing *Detainees of the Brooklyn House of Detention* v. *Malcolm*, *supra*.)[22] Application of the factual analysis of the prior case in the substantially different context of the MCC is highly questionable. At the MCC, detainees share nearly twice as much space in their residential rooms, are confined to their rooms for only 7-8 hours per day (or about half as long as in the *Detainees* case), during most or all of which they are presumably asleep, and their rooms open into modern and well-decorated multipurpose facilities instead of a long barren passageway as in *Detainees*. (Compare App. G, *infra*, p. 208a, with 520 F.2d at 395.) Furthermore, the expert testimony introduced by the government in this case concluded that double-bunking in the MCC residential rooms

---

[22] The district court entered summary judgment on this issue after touring the facility, holding that the decision in *Detainees* was dispositive against the use of double-celling at the MCC (App. G, *infra*, pp. 207a-211a). The district court relied significantly on the fact "that the rooms were *designed* and built to hold a single person, not more" (*id.* at 205a), and that double-celling results in "unwanted intimacy" (*id.* at 206a). The court stated that it was not required to relitigate "general propositions about matters of human experience" and concluded that the decision in *Detainees* established that double-celling was inherently indecent (*id.* at 211a).

would have no "significant detrimental effects on the physical or psychological health of the inmates at that institution" (*id.* at 209a).[23]

Even assuming that the court could permissibly have concluded that a significant abridgment of the inmate's personal privacy results from the use of bunk beds in the residential rooms, there is no basis in the decisions of this Court for the further conclusion that interference with privacy in this context must be supported by a "compelling" justification. The cases in this Court that have defined a constitutional privacy interest have never suggested that this interest requires a physical separation of all persons, especially in the context of institutional care or confinement.[24] Indeed, in *Lanza* v. *New York*, 370 U.S. 139, 143, the Court indicated that an individual's generalized interest in privacy lacks substantial weight during institutional confinement in a jail facility. The government's concerns for administrative convenience and fiscal necessity should therefore properly be considered in determining whether institutional abridgment of this aspect of personal privacy is justified as reasonable and humane government

[23] This distinguishes this case from *Campbell* v. *McGruder*, *supra*, slip op. 29, in which the District of Columbia Circuit upheld a decision banning double-bunking in 48-square-foot cells on the basis of a finding that the conditions were "likely to impair the mental and physical health of the detainees."

[24] The privacy cases have focused on the individual's control over his or her procreative choices. *Roe* v. *Wade*, 410 U.S. 113, 147-164; *Griswold* v. *Connecticut*, 381 U.S. 479.



action. See *Campbell* v. *McGruder*, *supra*, slip op. 17: *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370, 371.[25]

The court of appeals expressly refused to consider the administrative and fiscal interests of the government in its evaluation of the permissibility of double-celling at the MCC (App. A, *infra*, p. 19a). The court disregarded efforts made by the Bureau of Prisons to stem the unprecedented flow of inmates into the facility (pp. 6-7, *supra*) and the need to retain inmates at the MCC for the convenience of their trials in nearby courts. The court also gave no consideration to the fiscal constraints within which the Bureau operates or to the costs that would be required in altering operating procedures or in using or constructing additional facilities.

We do not mean to suggest that jail administrators should be allowed to justify any condition of confinement merely by claiming some connection, however tangential, with the needs of jail management. In determining whether the conditions are justified by

[25] In the absence of a restriction on a basic constitutional right, the government's interest in allocating finite public resources is a legitimate factor to be considered even when basic personal or economic needs of individuals are at stake. *Dandridge* v. *Williams*, 397 U.S. 471, 479-480. If no consideration is given to fiscal restraints in pretrial confinement, it is difficult to perceive any limit to the court of appeals' application of its "privacy" concept: a *per se* ban on the use of any room to hold more than one inmate would seem to result. Even the court of appeals, however, has not extended its reasoning to dormitory rooms, having instead indicated that they may be used to house 60 or more inmates (App. A, *infra*, pp. 21a-23a).

considerations of cost and feasibility, the existence of more suitable alternatives would bear on the reasonableness of the decision of jail authorities. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 374. Moreover, the level of care provided may not fall below a minimum threshold of decency and humane treatment. *Id.* at 370. The court of appeals did not rely upon any evidence that, in the specific context of the facilities provided at the MCC, the practice of double-bunking in residential rooms fails to provide minimally decent housing. The court's reliance upon the detainees' interest in privacy, and upon evidence of indecent conditions in a prior case involving substantially smaller quarters and a different institutional environment, does not support any such finding in this case. Rather than impose, in effect, a rule that double celling is *per se* unconstitutional, the court of appeals should have vacated the entry of summary judgment and remanded for an evidentiary hearing as to the justification for the practice in the particular context of the MCC.

3. The court of appeals recognized that maintenance of security and order is a compelling or inherent necessity of jail administration, and it stated that an "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (App. A, *infra*, pp. 12a-13a). In applying this standard to several specific institutional security practices claimed to abridge the constitutional rights of inmates at the MCC, however,



the court of appeals rejected the determination of correctional officials that the challenged practices serve the facility's substantial interest in security and order. The court held that these security practices were unjustified interferences with the retained constitutional rights of both detainees and convicted inmates,[26] and it enjoined further application of the rules at the MCC.

The court's holdings represent an impermissible intrusion into the affairs of jail administration, in disregard of this Court's decision in *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, *Pell* v. *Procunier*, 417 U.S. 817, and *Procunier* v. *Martinez*, 416 U.S. 396. We do not dispute that convicted prisoners and pretrial detainees alike retain constitutional rights that are consistent with the nature of their confinement, and that courts must guard against unwarranted interference with these retained interests. *Procunier* v. *Martinez*, *supra*, 416 U.S. at 405. Nonetheless, there are certain "limitations on constitutional rights * * * which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Labor*

---

[26] The district court and the court of appeals did not differentiate between the constitutional claims of pretrial detainees and convicted inmates in enjoining these security practices. It has been stated that when institutional security is the justification for a given restriction, even though fundamental constitutional rights may be implicated, there is no reason for distinguishing pretrial detainees from prisoners. *Main Road* v. *Aytch*, 565 F.2d 54, 57 (C.A. 3); *United States* v. *Hearst*, 563 F.2d 1331, 1345-1346 n. 11 (C.A. 9); *Taylor* v. *Sterrett*, 532 F.2d 462, 470 n. 11 (C.A. 5).

*Union*, *supra*, 433 U.S. at 125. For example, both First and Fourth Amendment rights are necessarily restricted during imprisonment and must be evaluated "in light of the special characteristics of the * * * environment." *Procunier* v. *Martinez*, *supra*, 416 U.S. at 410, quoting *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129; *Pell* v. *Procunier*, *supra*, 417 U.S. at 822; see also *Lanza* v. *New York*, 370 U.S. 139, 143.

This Court has held that the concern to protect rights specifically guaranteed by the Constitution does not change the basic standard by which courts are to review challenged restrictions in a prison context: if the regulation or practice is reasonably related to the objective of maintaining jail security and order, it should be upheld. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130. Furthermore, the burden should not be placed on prison authorities to show affirmatively that the absence of a particular restriction would be detrimental to the maintenance of security or order. *Id.* at 128. Instead, courts should ordinarily defer to the expert judgment of prison administrators and limit judicial inquiry to those occasions when "substantial evidence" indicates "that the officials have exaggerated their response" to the concerns of prison management. *Ibid.*; *Pell* v. *Procunier*, *supra*, 417 U.S. at 827.

In this case, the courts below failed to give proper recognition to these principles. Before turning to our discussion of the particular rulings of the court of appeals that we are challenging on these grounds, however, we wish to emphasize that we are not contending that the practices in issue are necessarily compelled in order to maintain minimum levels of security or that they may not prove subject to modification or amelioration in various particulars, as prison authorities deem prudent. The Bureau regularly reevaluates the need for various restrictive regulations; indeed, such a reevaluation is presently being undertaken by the Justice Department's correctional task force (see note 13, *supra*). The issue here does not concern the details of these policies but the proper boundary between the duty of the courts to enforce constitutional obligations and the province of correctional authorities to evolve sensible policies that do not overstep constitutional limits.



a. The courts below held that the MCC must allow inmates to receive packages containing items of personal property (App. A, *infra*, pp. 32a-33a). Government corrections officials testified in the district court that the rule prohibiting inmates from receiving packages of personal property was necessary to avoid fighting, stealing and extortion among inmates, and also to limit the introduction of items of contraband into the facility. These officials testified to the serious opportunities that packages provide for the undetected concealment of contraband items (A. 1242, 1550-1551, 1686).[27] The district court dismissed these security

[27] For example, contraband may be sewn into the linings of garments or concealed in food packages.

concerns as "dire predictions" (App. F, *infra*, p. 162a) and held the restriction against receipt of packages to be invalid as arbitrary and capricious (*id.* at 163a-164a). The court of appeals affirmed the findings of the district court, adding only that more permissive rules exist at other facilities and that there is "no indication that this greater liberality has resulted in unmanageable difficulties" (App. A, *infra*, pp. 32a-33a).

Neither of the courts below identified the constitutional nature of the inmates' asserted right to receive packages containing items of personal property while in custody.[28] Assuming that such a right may exist, there is no justification in the record for the courts' conclusion that it is arbitrary and capricious to deny inmates that right at the MCC.

Corrections officials testified to the important security concerns justifying the restriction on receipt of packages at the MCC. The courts below failed to give appropriate deference to this testimony. Despite the courts' disagreement with the security concerns of the expert witnesses, there was no "substantial evidence" in the record indicating that this testimony was disingenuous or exaggerated. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. In this situation the regulation should have been upheld: "It is enough to say that [the correc-

[28] There is no suggestion in either of the opinions below that restricted use of property in this context implicates any fundamental interest in free speech or expression.



tions officials] have not been conclusively shown to be wrong." *Id.* at 132. The court of appeals should have applied here the same analysis it applied in a subsequent portion of its opinion in concluding that

> the MCC's judgment that the particular problems of security, storage, and theft arising from inmates' ownership of typewriters must override the desire of some to possess them. [App. A, *infra*, p. 33a.]

The same principle of deference to correctional judgment applies whether typewriters or other items of personal property are involved.[29]

b. The courts below enjoined enforcement at the MCC of the Bureau of Prisons' "publisher only" rule. This rule, which applies to all Bureau facilities, permits inmates to receive books and magazines only if the materials have been mailed directly from publishers. Federal corrections experts testified in this case to the substantial risk to security and order that

[29] The court's suggestion that other institutions allow receipt of packages without any "indication" of "unmanageable difficulties" does not constitute adequate evidence that the Bureau's concerns for security are improper. See *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 132. The absence of testimony concerning difficulties encountered at other institutions is not "substantial evidence," or indeed "evidence" at all, in the record of this proceeding. Moreover, the statement of the court of appeals purports to establish, at most, that difficulties encountered at other facilities are not "unmanageable." But the Bureau may legitimately seek to avoid "manageable" as well as "unmanageable difficulties." The unrebutted testimony in this case was that the security problems would be significant if packages were allowed at the MCC.

they believe results when such materials are mailed to inmates from outside the facility. Books and magazines are especially serviceable as a means for smuggling drugs or money into the jail; detection of items secreted in these materials is difficult, and a sufficient inspection can often result in partial or total destruction of the materials (A. 90-92). The "publisher only" rule is designed to avoid this substantial problem of hidden contraband while still accommodating the inmates' legitimate desire for access to reading materials. The court of appeals, however, rejected the Bureau's security concerns and invalidated the rule. The court held that the rule "significantly intrude[s]" upon the inmates' First Amendment rights (App. A, *infra*, p. 26a) and concluded that the MCC could "adequately protect its legitimate interests merely by inspecting books and magazines for contraband" (App. A, *infra*, p. 26a).

The court erred in its conclusion that the "publisher only" rule meaningfully interferes with a substantial First Amendment interest. The rule allows books and magazines to be received if mailed from any publisher (and now from bookstores as well). There is no suggestion in the record that this alternative means of obtaining reading materials is insufficient. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 827-828. To the limited extent that the rule may increase the cost of obtaining published materials, this Court has held that where "other avenues" remain available for the receipt of materials by inmates, the



loss of "cost advantages does not fundamentally *implicate free speech* values." *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 130-131 (emphasis in original).[30] Accordingly, in light of the alternative channels that remain open for the receipt of materials by inmates and the fact that the rule "operates in a neutral fashion, without regard to the content of the expression," the "publisher only" rule does not substantially affect the freedom of expression retained by inmates at the facility. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 828.

Moreover, the court of appeals misplaced the burden of proof in rejecting the Bureau's security concerns. The Bureau established its substantial need for strict supervision of these materials and the unmanageability of item-by-item inspection. There was no "substantial evidence" in the record suggesting that these concerns were not genuine, or that the administrative limitation applies too broadly.[31] *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Rather, the only evidence introduced

---

[30] Furthermore, the MCC has a "relatively large" library for use by inmates, which mitigates to some extent any possible harshness of the rule (App. A, *infra*, pp. 26a-27a; App. G, *infra*, p. 216a).

[31] The district court asserted that the security concerns applied only to hard cover books, and that application of the "publisher only" rule to soft-back books was therefore overbroad (App. G, *infra*, p. 215a). The court's conclusion is inconsistent with the evidence that contraband may be secured between the pages of such books, making administrative detection unmanageable (A. 90-92).

*indicates the reasonableness of the rule as a moderate* and limited response to a significant security concern. The Tenth Circuit has upheld the Bureau's "publisher only" rule in *Woods* v. *Daggett*, 541 F.2d 237 (C.A. 10).[32] The decision of the court of appeals in this case has thus created a conflict among the circuits as to the validity of the Bureau's nationwide "publisher only" rule.

c. Inmates at Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as part of the strip search conducted after contact visits with persons from outside the facility. This requirement has been upheld by several courts as a reasonable means of safeguarding correctional facilities against the introduction of weapons and contraband following contact visits. *E.g.*, *Daugherty* v. *Harris*, 476 F.2d 292 (C.A. 10), certiorari denied, 414 U.S. 872; *Bell* v. *Manson*, 427 F. Supp. 450 (D. Conn.); *Hodges* v. *Klein*, 412 F. Supp. 896 (D. N.J.); *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 (S.D.N.Y.); *Bijeol* v. *Benson*, 404 F. Supp. 595 (S.D. Ind.); *Penn El* v. *Riddle*, 399 F. Supp. 1059 (E.D. Va.). The need for such precautionary measures is justified by the fact that contact

[32] The Second Circuit distinguished *Woods* on the grounds that the case concerned a maximum security facility (App. A, *infra*, pp. 26a-27a n. 10). The court stated that inmates at the MCC pose a far smaller security risk (*ibid.*). There is nothing in the record to support this conclusion. Indeed, the testimony of Bureau of Prisons officials established that the risk of contraband smuggling at the MCC would be substantial without the "publisher only" rule (A. 90-92).



visits "present a unique opportunity for passing contraband, including weapons and drugs, into the Jail." *Feeley* v. *Sampson*, *supra*, 570 F.2d at 373.

The court of appeals held in this case, however, that unless there is probable cause to believe that the inmate is secreting contraband, this relatively intrusive form of inspection violates the Fourth Amendment. The court recognized that persons in custody relinquish some part of their protection against intrusive searches to protect the security of custodial facilities (App. A, *infra*, p. 29a). See, *e.g.*, *Lanza* v. *New York*, *supra*, 370 U.S. at 143.[33] The court ruled, however, that since the MCC "proved only one instance in the several years of its existence when contraband was found during a body cavity inspection," the procedure is of "little actual utility" at the MCC and is therefore unjustified (App. A, *infra*, p. 30a).[34]

This holding by the court of appeals disregards substantial evidence documented in this record (A. 1442, 1447-1450), and elsewhere (see *United States*

[33] In *Hoitt* v. *Vitek*, 361 F. Supp. 1238, 1254-1255 (D.N.H.), the court relied on *Lanza* for the proposition that inmates have no reasonable expectation of privacy in their cell rooms. Other courts have held that inmates retain some minimal right to privacy under the Fourth Amendment, but that this retained right is subject to reasonable searches undertaken in furtherance of the institution's interest in security. *E.g.*, *Bonner* v. *Coughlin*, 517 F.2d 1311, 1316-1317 (C.A. 7); *United States* v. *Savage*, 482 F.2d 1371, 1372-1373 (C.A. 9), certiorari denied, 415 U.S. 932.

[34] This observation wholly ignores the substantial deterrent effect that such searches inevitably have on efforts to pass contraband to inmates during contact visits.

v. *Park*, 521 F.2d 1381, 1382 (C.A. 9)), that body cavity inspections following contact visits discover and deter attempts to secrete drugs and weapons into an institution. The court of appeals erred in substituting its judgment for that of the corrections officials as to the "actual utility" of this security procedure. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 827. The Bureau informs us that the problem of safeguarding its facilities from the introduction of contraband during contact visits is a significant correctional security concern and that it is reluctant to abolish or restrict the relatively liberal policies it now pursues in allowing contact visits (which many state correctional systems prohibit or severely limit). Accordingly, we request resolution by this Court of the conflict among the circuits created by the decision below with respect to this issue.

d. Finally, in a portion of its decision applying to pretrial detainees only, the court of appeals held that detainees must be allowed to observe routine inspections of their quarters. Substantial testimony was introduced before the district court to demonstrate that permitting detainees to observe room inspections leads to unnecessary friction and attempts by inmates to move concealed contraband (A. 1240-1241, 1545-1546, 1610, 1717-1718). The district court held, however, that these concerns were not "compelling" and were outweighed by the detainees' retained privacy interests (App. F, *infra*, p. 156a). The court of appeals affirmed, stating that "[w]e see no reason



whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege * * *" (App. A, *infra*, p. 31a).

There is no authority for the proposition that persons—either inside or outside of jail—have a privacy interest that requires that lawful searches of their premises be conducted in their presence. The fact that the searches conducted in this case are performed in a jail, where continual surveillance of quarters has always been recognized as a necessary condition of confinement, certainly does not enhance the individual's claim to privacy under the Fourth Amendment. See *Lanza* v. *United States*, *supra*, 370 U.S. at 143; *Smith* v. *Shimp*, 562 F.2d 423, 426 n. 2 (C.A. 7). Furthermore, the court's conclusion that there is "no reason whatsoever" to refuse to allow detainees to observe routine room inspection is inconsistent with the evidence of record in this case (*e.g.*, A. 1240-1241, 1545-1546, 1610, 1717-1718). Here, as in the several contexts discussed above, the court of appeals has failed to give appropriate weight to the unrebutted security justification established in the testimony of corrections officials.

> The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.

*Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JOHN C. KEENEY,
*Acting Assistant Attorney General.*

KENT L. JONES,
*Assistant to the Solicitor General.*

SIDNEY M. GLAZER,
KATHLEEN A. FELTON,
*Attorneys.*

JUNE 1978.



## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

Nos. 618, 623—September Term, 1977

(Argued January 6, 1978 Decided January 24, 1978)

Docket Nos. 77-2035, 77-2135

---

LOUIS WOLFISH, et al., PETITIONERS-APPELLEES

*v.*

HONORABLE EDWARD LEVI, et al.,
RESPONDENTS-APPELLANTS

---

Before:

KAUFMAN, *Chief Judge*,
TIMBERS and MESKILL, *Circuit Judges*.

---

KAUFMAN, *Chief Judge*:

When the history of our criminal justice system is chronicled, no doubt one of its most sobering pages will describe the sad state of this nation's prisons and jails. Whether it be in filthy, narrow cells of an Alabama penitentiary or in overcrowded dormitories in a Bronx house of detention, we have quartered

individuals, both convicted or merely accused of crimes, major and minor, under conditions that shock the conscience of civilized men. To redress these glaring deficiencies, courts have often been summoned to insure that, at the least, minimum standards of human decency are met. And, when inhuman or barbaric conditions, or in the case of pretrial detainees, substantial deprivations not compelled by administrative necessity, are discovered, judges should not hesitate to enter the breach.

But, courts are singularly ill-suited to administer the minutiae of the daily affairs of prisons. Accordingly, although district courts are empowered with broad discretion to frame equitable remedies so long as the relief granted is commensurate with the scope of the constitutional infraction, a trial judge must tread carefully in less substantial matters best left to the expertise of prison officials.

This sprawling appeal, raising a score of issues concerning conditions and practices of New York's Metropolitan Correctional Center ("MCC"), presents this dilemma in sharp relief. In his decree, Judge Frankel intervened broadly into almost every facet of the institution. In most instances, the able district court judge's incursion on administrative authority was well-founded, and cured serious constitutional deficiencies in the operation of the MCC. But in other cases we believe a balance more restrained should have been struck between the court's power to redress inmate grievances and deference to prison administrators. Many of the cited deficiencies, if in-



deed they existed, were not of a kind to require a chancellor's decree to bring about compliance.

Of course, the problems presented by such an overexpansive decree does not fall on the trial judge's shoulders alone. In too many cases, the parties' impulse is to run to the courts as a first resort, no matter how minor or trivial the problem. The fault in this respect lies too often with unresponsive or uncooperative government officials. And as then Chief Judge Friendly aptly stated in *Negron* v. *Wallace*,[1] "there is . . . a responsibility, resting upon all counsel but especially upon those for civil rights organizations, not to swell the tidal wave of actions under the civil rights statute by bringing suits for . . . relief when no need for this exists." [2] After wading through the many aspects of this decree, we can only implore the litigants in this case to avoid this increasingly acute problem of "litigation neurosis" [3] in future dis-

---

[1] 436 F.2d 1139 (2d Cir. 1971).

[2] *Id.* at 1141.

[3] See Kaufman, 39 Brooklyn L. Rev. xiii, xiv-xv (1973). The famous satirical writer Russell Baker commented in a recent *New York Times* article that immediate resort to the courts to solve every problem, no matter how insignificant, has become "a new national habit." But, using as an illustration a lawsuit by women students against Yale University, he cogently observes, "[t]he courthouse solution is not only expensive, troublesome to the [student] and time consuming, but also debilitating to her self-esteem, for it reminds her that to cope with the problem which her mother could solve in an afternoon, she requires the aid of lawyers, a judge, a jury, witnesses, transcripts, three years of litigation and two appeals courts." Baker, "The Courts of First Resort," *N.Y. Times*, July 26, 1977, at 29, col. 1.

putes by resolving petty problems in the administrative arena, without burdening our courts.

## I.

In August 1975, when the Metropolitan Correctional Center replaced the converted waterfront garage on West Street that had served as New York City's federal jail for over 45 years, it represented the architectural embodiment of the best and most progressive penological planning. Abjuring the cage motif of traditional cellblock jail construction, the architects of the MCC, the New York firm of Gruzen and Partners, well-known for its innovative work in correctional design, created a series of self-contained "modular units". Each unit consisted of approximately 24 private rooms, or six dormitory rooms, adjacent to a multi-purpose room, a balcony education area and a recreation room to which inmates were to, and in fact do, have access for 16 to 19 hours a day.

In the view of Paul Silver, Gruzen's principal architect on the MCC project, as well as the numerous other correctional experts who assisted in the jail's development,[4] the modular unit concept was a sensible alternative to the "illusory freedom" of the standard jail. By substantially eliminating the need

[4] Among those experts were several witnesses in this case, including: Norman Carlson, Director of the Bureau of Prisons; Gary Mote, Assistant Director of Planning and Development for the Bureau; Dr. Walker W. Menninger; and, William G. Nagel.



for inmate movement to major facilities within the institution, the corresponding necessity of locking inmates in their cells while the staff directed traffic was reduced and face-to-face contact between inmates and their keepers increased. The modular unit, in short, was expected to humanize staff-inmate relations and provide a more "homelike" atmosphere, affording inmates greater privacy and freedom than jails of earlier construction.

The modular unit concept was fully implemented in the design of MCC. Each of the ten residential units is furnished with recreational and exercise equipment, telephones, color televisions, books, food preparation and dining facilities, and a visiting room. The residential atmosphere is enhanced by carpeting and the exterior walls are studded with clear plastic windows. There are no central dining, recreational, religious, assembly or work facilities with the exception of an outdoor recreation area on the roof.

When this action was commenced, the law library, general library and commissary were all essentially storerooms from which books and other items could be ordered. In fact, most inmates, except a selected cadre of sentenced inmates, may leave their unit only for one hour of daily recreation on the roof, if the weather permits, and for sick calls, and court appearances.

But, Samuel Johnson's comment, "Hell is paved with good intentions," [5] is particularly appropriate

[5] Boswell, *Life of Johnson*, April 14, 1775.

here. While the MCC in operation can by no means be characterized as an earthly Hades, it nevertheless has fallen far short of its planners' expectations. Their major miscalculation has proven to be a failure to foresee the influx of more inmates than contemplated. Although originally designed to accommodate a population 50 percent larger than the 300 inmate capacity of the West Street jail, an unprecedented rise in pretrial and sentenced commitments commencing in 1975 quickly forced the MCC to house numbers significantly in excess of its rated capacity. To satisfy these demands, the MCC's administrators have pressed into service every square foot of space which conceivably could be used as sleeping space. The deleterious effects of this overcrowding will be described in greater detail. Suffice to say that overcrowding has destroyed any modicum of privacy for many pretrial detainees. They find themselves double-bunked in rooms designed for and, according to Silver, capable of holding only one. We find even more disturbing however, the fact that when no rooms are available, as is customarily the case, new arrivals are forced to sleep on sofas or cots in the common areas under the glare of constantly burning lights. And sentenced inmates have been crammed 20 at a time into dormitories intended to house only ten. Moreover, the stresses of serious excess population have burdened beyond capacity equipment and other facilities designed for far fewer people.



II.

The consequences of this excessive crowding, strained by frustrations over the physical curbs resulting from modular confinement and the restrictions and degradation that are common generally to prisoners, led to the institution of this suit. Indeed, this lawsuit mirrors the difficulties present at the MCC almost from its inception, for it was commenced barely four months after the institution opened. On November 28, 1975, inmate Louis Wolfish, proceeding *pro se*, sought a writ of habeas corpus because of allegedly unconstitutional conditions at the facility. A week later, on December 2, 1975, the action was declared a class action on behalf of all persons confined at the facility, including pretrial detainees and sentenced prisoners,[6] and the Legal Aid Society was assigned as counsel. On January 11, 1976, the Society filed an amended petition, charging that inmates had been deprived of their constitutional and statutory rights because of, *inter alia*, overcrowded conditions, lengthy confinements, unnecessary restrictions on movement, inadequate visiting hours, and lack of sufficient employment, recreational

---

[6] In addition to pretrial detainees—that is unconvicted individuals awaiting trial, held at the MCC because they could not post bail—the MCC holds sentenced prisoners awaiting assignment to another prison facility or who have been designated to serve their terms at the MCC, sentenced prisoners transferred to the MCC on writs to testify or stand trial, witnesses in protective custody, and persons incarcerated for contempt of court.

and educational opportunities. This litany of woes touched on almost all aspects of the institution's conditions and practices.[7]

In the year following the filing of the amended petition, Judge Frankel intervened twice to correct alleged maladministration of the facility. On January 28, 1976, after notices at the MCC heralded a severe curtailment of visiting hours, he issued a preliminary injunction to maintain the status quo pending the outcome of the litigation. And on October 1, 1976, after the New York Telephone Company threatened to remove the MCC's telephones because of a multitude of fraudulently placed calls, a second preliminary injunction was issued ordering the facility to maintain and improve its system of local and long distance telephone services.

## III.

Upon appellees' motion, and appellants' cross-motion for partial summary judgment, a variety of other issues were decided on January 5, 1977. Relying on affidavits "recounting undisputed facts" and upon his own observations in touring the facility, Judge Frankel enjoined the use of single occupancy rooms for two inmates ("double-celling"), confiscation of property without supplying receipts, reading of outgoing mail, and enforcement of a "publisher only" rule that limits inmates to the receipt of reading materials directly from a publisher or book club. On the other hand, Judge Frankel upheld the appellants' practice of opening mail in the presence of the recipient for the exclusive purpose of discovering contraband. Rulings on other complaints, including a severe limitation on the receipt of packages, were deferred. *See United States ex rel. Wolfish* v. *Levi*, 428 F. Supp. 333 (S.D.N.Y. 1977). Appellants filed a notice of appeal from this order on March 18, 1977.

[7] As an indication of the scope of this action, the amended petition also decried the inadequate phone service; "strip" searches; room searches outside the inmate's presence; a prohibition against the receipt of packages or the use of personal typewriters; interference with, and monitoring of, personal mail; inadequate and arbitrary disciplinary and grievance procedures; inadequate classification of prisoners; improper treatment of non-English speaking inmates; unsanitary conditions; poor ventilation; inadequate and unsanitary food; the denial of furloughs; unannounced transfers; improper restrictions on religious freedom; and an insufficient and inadequately trained staff.



## IV.

Finally, trial of the many remaining issues began on February 28, 1977 and continued until the end of the following month. At trial, appellees called 21 witnesses, relying primarily on the testimony of MCC inmates and four correctional experts; appellants, in turn, summoned 23 witnesses to the stand, including MCC personnel and a battery of seven correctional experts.[8] In addition to hearing this

[8] Of the 21 witnesses called by the appellees, ten were inmates or former inmates of the MCC who had been incarcerated in virtually every area of the prison for appreciable lengths of time. In addition, appellees presented the testimony of the following correctional experts: Dr. Frank N. Rundle,

testimony and receiving numerous exhibits into evidence, Judge Frankel in his customary conscientious manner, twice toured the MCC during trial.

On September 15, 1977, the judge decided all the remaining issues except those related to the adequacy of medical care.[9] He granted relief on the issues concerned with classification and movement between modules, overcrowding, law library facilities, the commissary, receipt of packages, use of personal typewriters, social and attorney visitation, telephone service, inmate presence during room searches, "strip" searches, uniforms, the availability of exercise for those inmates held in administrative detention, special diets for Muslim inmates, inspection of "incoming mail", and women's "lock-in". Other claims, touching on food, staff, and transfers, were

---

supervising psychiatrist with the Lower East Side Service Center in New York City; William G. Nagel, Director of the Institute of Corrections of the American Foundation; Dr. David Fogel; and, Henry Alter.

Of the 23 witnesses called by the appellants, 14 were employees of the MCC. They also utilized seven expert witnesses, four of whom were employees of the Federal Bureau of Prisons. These experts included Gary Mote, Associate Director of Planning and Development for the Bureau; Norman Carlson, Director of the Bureau, and Dr. William Walter Menninger. The roster of expert witnesses on both sides of this litigation is familiar to all who have followed the history of cases in this Circuit involving the conditions of pretrial detention.

[9] The medical issues are presently being tried before the Hon. Sol Schrieber, U.S. Magistrate, who is sitting as a special master pursuant to Judge Frankel's order dated August 30, 1977.



dismissed. *See United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114 (S.D.N.Y. 1977). On October 21, 1977, appellants filed a notice of appeal from this judgment.[10]

## V.

*Constitutional Standards*

1. *Pretrial detainees*

Fundamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty by a jury of his or her peers. We have demonstrated our belief in this basic principle by according to pretrial detainees the rights afforded unincarcerated individuals, including, *inter alia*, rights to free speech, *Wilkinson* v. *Skinner*, 462 F.2d 570 (2d Cir. 1972), and freedom of religion, *Kahane* v. *Carlson*, 527 F.2d 492 (2d Cir. 1975). Accordingly, it is not enough that the conditions of incarceration for individuals awaiting trial merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment. Time and again, we have stated without equivocation the indisputable rudiments of due process: pre-

---

[10] Subsequently, on November 15, 1977, we granted the appellants' request for a stay of portions of the judgment. At the same time, because of the importance of the issues raised by the case, we expedited the hearing of this appeal, and consolidated the appeal from the previous summary judgment order with the appeal from the final judgment of October 13, 1977.

trial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration." *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974) ("*Rhem I*"); *Rhem* v. *Malcolm*, 527 F.2d 1041 (2d Cir. 1975) ("*Rhem II*"); *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975) ("*Detainees*"). This standard of compelling necessity is neither rhetoric nor dicta. And we have made it clear that deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity, *Todaro* v. *Ward*, —— F.2d ——, Slip Op. at 156, n.8 (2d Cir. October 31, 1977), administrative convenience, *Estelle* v. *Williams*, 425 U.S. 501, 505 (1976), or by the cold comfort that conditions in other jails are worse, *Rhem I*, 507 F.2d at 338. *See generally* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 Yale L.J. 941 (1970).

But, we cannot ignore the Supreme Court's admonition in *Procunier* v. *Martinez*, 416 U.S. 396, at 405 (1974):

> . . . . courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

*See also Newman* v. *State of Alabama*, 559 F.2d 283, 286-87 (5th Cir. 1977).

Accordingly, once it has been determined that the mere fact of confinement of the detainee justifies the restrictions, the institution must be permitted to use



reasonable means to insure that its legitimate interests in security are safeguarded. We may disagree with the choice of means, but it is not wise for us to second-guess the expert administrators on matters on which they are better informed. *See Jones* v. *N.C. Prisoners' Labor Union*, —— U.S. ——, 97 S. Ct. 2532 (1977). Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?

2. *Sentenced Inmates*

The parameters of judicial intervention into the conditions of incarceration for sentenced prisoners are more restrictive than in the case of pretrial detainees. An institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety. The Constitution does not require that sentenced prisoners be provided with every amenity which one might find desirable. *Newman* v. *State of Alabama*, *supra*, 559 F.2d at 291.

VI.

*Statutory Jurisdiction*

Although the judgment in this case is in substantial part grounded on uncontrovertible constitutional principles, it seems to wander on occasions into administrative matters that can only be described as

trivia. It appears the trial court justified a number of these intrusions solely on its assertion of a federal judge's statutory jurisdiction to oversee the operation of federal jails and prisons and not on any constitutional infringements.

While it is true that the Administrative Procedure Act permits a federal court to set aside federal agency action found to be "arbitrary" or "capricious", in violation of a statute, or of the Constitution,[11] there is substantial disagreement whether the Act applies to federal prisons. *Compare Clardy* v. *Levi*, 545 F.2d 1241 (9th Cir. 1976) *with Ramer* v. *Saxbe*, 552 F.2d 695 (D.C. Cir. 1975). We find it unnecessary to decide whether the Act would apply if the breach of a specific statutory mandate by federal prison officials were established, however, for the Act specifically exempts entirely from judicial review "agency action [which is] committed to agency discretion by law."[12] *See Greater New York Hospital Ass'n* v. *Mathews*, 536 F.2d 494 (2d Cir. 1976). The enabling statutes relied upon by appellees vest this broad unreviewable discretion in the Attorney General, merely requiring him to provide "suitable" quarters, safekeeping, care and subsistence for all inmates in his custody.[13] Accordingly, we cannot find any basis for

[11] *See* 5 U.S.C. § 706 (1976).

[12] *See* 5 U.S.C. § 701(a)(2) (1976).

[13] *See* 18 U.S.C. § 4042 (1970). *See also* 18 U.S.C. § 4081 (1970).



the invocation of statutory jurisdiction in this case.[14]

The wisdom of the Act's exemption of matters committed to agency discretion is only too vividly illustrated by the judgment in this case, for, unfortunately, the price of reaching to cure petty inconveniences, although motivated by the most humane instincts, is to fail to reserve the judge's awesome power and authority for matters of substance, not to be diminished by triflings. A striking example is the section of the decree abolishing the MCC's policy requiring visitors to request the key to the visiting room bathroom from a correctional officer. Although we understand that the order emanates from the court's understandably frustrating attempt to cope with the MCC's policy on social visits, which at one time forced visitors to return to the lobby and endure a lengthy reprocessing procedure whenever they wished to use restroom facilities, such a direction, prohibiting a practice commonly employed by service stations, or corridor restrooms of major corporations, could be better dealt with by methods other than inclusion in a judgment of a federal district court.[15]

It would have been advisable also for the trial court not to become embroiled in the emotion-laden contro-

[14] In contrast, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), relied on by appellees, involved the violation by the Secretary of Transportation of a specific statutory mandate requiring him not to approve construction of a road through a park unless no feasible alternative existed.

[15] See *Negron* v. *Wallace*, 436 F.2d 1139 (2d Cir. 1971).

versy between the parties over the provision of telephone services. When this litigation commenced, the MCC provided 23 pay telephones for local calls. But in September 1976, appellants advised counsel for the appellees that the number of telephones available for inmate use would be cut in half due to massive losses incurred by the New York Telephone Company as a result of fraudulently made telephone calls. On October 1, 1976, the trial court preliminarily enjoined the reduction, and mandated the installation of 23 telephones for long distance calls. The terms of this injunction are embodied in the final judgment.

Although pretrial detainees enjoy a first amendment right to communicate by telephone with persons outside the prison, that right has never been construed to mandate a special level of telephone service. *See e.g., Dillard* v. *Pritchess*, 399 F. Supp. 1225, 1240 (C.D. Cal. 1975). Accordingly, to require the MCC to return to court whenever it seeks to make any change, however minor, in its phone service, would place great strains on overburdened federal judges and would, in essence, preempt the role of prison officials.[16] Disputes of a kind just illustrated would

[16] For the same reason we must reverse the district court's order requiring the MCC to maintain precisely unchanged its present schedule for social visits. Pretrial detainees certainly have a first amendment to contact visits. *See, e.g., Miller* v. *Carson*, 563 F.2d 741, 748 (5th Cir. 1977). Moreover, visits should be as long as administrative manageability allows. *See Gilmore* v. *Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd*, 404 U.S. 15 (1971). But to require appellants to return to court whenever they seek to make even minor adjustments in the visiting hours constitutes an undue burden on the court and the administration.

We also strike the portion of the order, founded solely on an assertion of statutory jurisdiction, which requires the MCC to take commissary requests every other day rather than once a week. See also, our discussion of attire, *infra*, pp. 1222-1223.



best be handled by the inmate grievance procedure provided by the Bureau of Prisons, rather than federal courts.[17]

## VII.

*Overcrowding*

a. *Double-celling*

Of the 389 rooms in the MCC designed for single occupancy, 121 were double-celled when Judge Frankel banned the practice in January 1977. Since the administrators of the MCC have made no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling, we affirm as to pretrial detainees. We remand for reconsideration the prohibition on double-celling of sentenced inmates for reasons we shall set forth.

In *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975), we found the confinement of two pretrial detainees in a single forty square foot cell in the Brooklyn and Queens houses of detention so "dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainee's due process and equal protection rights." 520 F.2d at 397. The in-

[17] See Department of Justice, Bureau of Prisons Policy Statement No. 2001.6A (October 16, 1974).

fringements on privacy and personal dignity which underlay that decision are also present here.

Visual inspection of the rooms, coupled with the testimony of architect Paul Silver that double-celling was a "clear violation of the capability" of the MCC's individual rooms, led Judge Frankel to conclude that their basic structure mandated use by a single occupant. Indeed, the average room affords two inmates virtually no space for minimal privacy or in which to avoid the other's presence. Inmate testimony revealed that double-celling had produced numerous disagreements over the choice of activities within the room, and had spawned fights, charges of theft, and frequent involuntary physical contact as the two inmates passed each other in the narrow 35 square feet aisle of walking space.[18] Moreover, double-celling substantially taxed common area facilities. Judge Frankel found, for example, that insufficient dining accommodations had created "more pressure to eat in the cell, with its single chair, open toilet and unselected companion." [19]

Appellants argue that the average room at the MCC is nearly twice as large—75 square feet—than the cells involved in *Detainees*, and that other conditions at MCC are more pleasant. But we find the lack of privacy inherent in double-celling in rooms intended

---

[18] Similarly, we found in *Detainees* that the confinement of two pretrial detainees together not only deprives each of his privacy but also increases tension and aggressive tendencies. *See* 520 F.2d at 396.

[19] 428 F. Supp. at 337.



for one individual a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete, or windows for walls. The government has simply failed to show any substantial justification for double-celling. In fact, since Judge Frankel's order in January 1977, the MCC has eliminated double-celling merely by reducing its permanent work "cadre" of convicted inmates designated to serve their sentences at MCC from 103 to 21. Although this diminution of the "cadre" has made the operation of MCC somewhat more difficult, administrative inconvenience can never excuse the deprivation of the constitutional rights of pretrial detainees. *Cf. Estelle* v. *Williams*, 425 U.S. 501, 505 (1976). Indeed, the reduction of the "cadre" has had the beneficial effect of opening more work opportunities to idle pretrial detainees and writ prisoners.

The trial court also banned double-celling of sentenced inmates on the ground that to quarter "an inferior minority of persons . . . in ways found unconstitutional for the rest" would constitute cruel and unusual punishment. *See* 428 F. Supp. at 339. This, of course, ignores our insistence that different and higher constitutional standards must be applied to pretrial detainees than to sentenced prisoners. As we noted earlier, appellants owe the convicted population merely the duty of providing adequate housing. We expect that on remand the trial court may well find that double-celling in a 75 square foot room violates the eighth amendment. Such an arrangement

allows each prisoner only 38 square feet of space in the individual room, well below accepted standards recommending the provision of 50 to 75 square feet of room space per inmate.[20] But, it appears that the "cadre" of sentenced inmates is housed in the Honor Unit, which contains rooms ranging in size from 100 to 150 square feet. We cannot say on the record before us that placing two sentenced inmates in rooms so spacious constitutes a *per se* violation of the eighth amendment.

b. *Balconies*

An average of 27 or 28 newly-arrived inmates sleep in the common areas of the MCC every night. At trial, individual inmates testified that stays in the common areas often stretch to a week or more. Since cots and personal belongings are inaccessible during the day, the balconied inmate is accorded, as Judge Frankel found, "literally zero square feet" of personal

[20] See note 22, *infra*, and the accompanying text. We note also that the Commission on Accreditation for Corrections of the American Correctional Association has recommended that individual cells have a floor area of at least 60 square feet. *See* Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional Institutions*, Standard 4142 (August 1977). And in *Ambrose* v. *Malcolm*, 414 F. Supp. 485, 492 (S.D.N.Y. 1976), Judge Lasker noted that the National Sheriffs' Association's *Handbook on Jail Architecture* (1975), 62-63, recommends that single occupancy rooms should average 70 to 80 square feet. *But see Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 690 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).



living space. Such an inmate has no means of securing any degree of privacy. Moreover, sleeping is difficult because the balcony lights burn all night. Since appellants have offered no explanation for this completely inadequate housing except administrative convenience, we affirm Judge Frankel's prohibition of the practice. *See Todaro* v. *Ward*, *supra*, Slip op. at 156, n.8.

c. *Dormitories*

The dormitory unit, originally intended to hold ten inmates in each of its six rooms, now houses 120 sentenced inmates. As a result, the district court found, the situation within the dormitory unit "is one of intolerable crowding, strain, and distortion of facilities." 439 F. Supp. at 136. He ordered that a maximum of 60 inmates be housed in the dormitory unit.

While concurring in Judge Frankel's assessment that operation of the dormitory unit at 200 percent of "rated capacity", even when it is used solely for sentenced inmates is unacceptable, we find unwarranted his refusal to consider whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories. There is no constitutional magic to the term "rated capacity". Indeed, "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space." *Newman* v. *Alabama*, *supra*, 559 F.2d at 288.

Rather than clinging to the term "rated capacity" as the constitutional standard, we prefer to adopt

Judge Lasker's approach in *Ambrose* v. *Malcolm*, 414 F. Supp. 484 (S.D. N.Y. 1976), where he limited to 29 the number of pretrial detainees who could be confined for 23 hours a day in a cell-block consisting of a corridor, a small day room, and a dormitory "rated" for 24 inmates. The figure was derived from the American Correctional Association's standard providing that each inmate should be allowed a total of 75 square feet of living space.[21] To meet the needs of sentenced inmates, the Fifth Circuit, in *Williams* v. *Edward*, 547 F.2d 1206, 1215 (5th Cir. 1977), has found 50 square feet of sleeping space adequate. *See also Newman* v. *Alabama*, *supra*, 559 F.2d at 288.[22] In fact, if 15[23] sentenced inmates were housed

---

[21] *See* 414 F. Supp. at 489, 493.

[22] This standard compares favorably with the National Sheriffs' Association's *Manual on Jail Administration* (1970) at 39, which suggests 55 square feet of space per bed in a dormitory, as well as the recommendation of the National Council on Crime and Delinquency Model Act for the Protection of Rights of Prisoners (1972) (§ 1b) that not less than 50 square feet of floor space be provided in the sleeping area, and with Army guidelines providing 55 square feet of sleeping space per prisoner. *See* 414 F. Supp. at 492-93. The American Correctional Association's Commission on Accreditation for Corrections has recommended that a minimum of 60 square feet be accorded each inmate housed in a dormitory unit. See Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional Institutions*, Standard 4144 (August 1977).

[23] We select 15 inmates as an example because Paul Silver testified that one set of "commonly accepted" criteria in prison design is the provision of one urinal, one toilet and one shower



in each MCC dormitory, every inmate would be allotted 58 square feet of space in the dormitory room and 32 additional square feet in the common area. We therefore remand to the district court for reconsideration of this issue.

*Physical Constraints of Modular Confinement*

As we noted above, except for the "cadre", the inmates of the MCC are permitted to leave their units only to go to the roof recreation area, sick call, or to court. This lack of movement severely limits inmate opportunities to attend religious services and educational and recreational programs which are normally given in only a few of the units. Expert testimony at the trial demonstrated that such restricted confinement over lengthy periods of time could have adverse psychological effects on some inmates. But, although appellants' own witnesses conceded that not all inmates at the MCC require the close custody inherent in strict confinement in the modular unit and that classification would permit freer circulation within the institution, no classification procedure, beyond the largely successful attempt to separate pretrial detainees from sentenced prisoners, exists at the MCC. The district court judge properly ordered ap-

---

for 15 inmates. *See* Deposition of Paul Silver at 54. Thus, it appears that sufficient sanitation facilities may exist in the dormitories to support up to 15 inmates.

pellants to create additional classification guidelines to permit greater movement within the institution.[24]

Judge Frankel also decreed that no inmate may be held without consent at the MCC for more than 60 days. We find the 60-day limitation somewhat arbitrary. We agree that excessively long stays in the MCC may constitute a denial of due process. But, Judge Frankel's opinion supplies no factual basis for the selection of this particular demarcation point. And, since the statistical evidence in this case indicates that over 90 percent of unsentenced inmates are released within three months,[25] we are not persuaded that confinement in excess of 60 days transforms the MCC into a "long-term prison", as the trial court described it, except in several unusual cases.

But, even if the 60-day limitation was warranted under the conditions existing at the time of trial, Judge Frankel has now ordered the appellants to promulgate new classification standards to allow greater movement within the institution. If suffi-

[24] We reject appellants' protest that classification of pretrial detainees is impossible for the reasons stated in *Rhem I*, 507 F.2d at 338.

[25] Unfortunately, the statistics used by both the appellants and appellees in their briefs concern the length of stay of *all* inmates, sentenced and unsentenced. Analysis of the corrected affidavit of Marshall Haines, dated June 13, 1977, reveals that over half of the unsentenced detainees held in the MCC prior to trial during the period August 2, 1975 to August 13, 1976 spent ten days or less in the MCC. Three-quarters were released within a month, and more than 85 percent were released within 60 days, although one pretrial detainee was incarcerated for more than a year.



ciently liberal, the new guidelines may considerably ameliorate those very restrictive aspects of modular confinement which necessitated the imposition of the 60-day restriction. Accordingly, we direct appellants to prepare new classification standards within thirty days of this decision, and remand for reconsideration of the 60-day rule in light of those standards.

Finally, since the sole constitutional underpinning for the 60-day requirement was "due process", and there was no finding that longer confinement constituted cruel and unusual punishment, the time limitation should not have been applied to sentenced inmates, and should not be so applied if the trial court chooses to impose a similar time restriction on remand unless he finds that the longer confinement violates the eighth amendment.

*Freedom of Speech and Communication*

In the close and restrictive atmosphere of a prison, first amendment guarantees taken for granted in society at large assume far greater significance. The simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment. Accordingly, courts have jealously protected the inmate in his exercise of first amendment prerogatives. *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Sostre* v. *McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Oswald*

v. *Sostre*, 405 U.S. 978 (1972). Two of the MCC's policies, the "publisher only" rule and the reading of out-going nonprivileged mail, significantly intrude upon this protected realm.

Pursuant to a policy of the Bureau of Prisons, the MCC permits inmates to receive books and other publications from outside the institution only if the item comes directly from the publisher or a book club. Ostensibly, the practice is justified by substantial security problems, giving rise to administrative difficulties in processing reading materials received from all sources. Judge Frankel noted that the MCC could adequately protect its legitimate interests merely by inspecting books and magazines for contraband. He observed, further, that other institutions have not recorded untoward experiences with far less restrictive rules.

The "publisher only" rule severely and impermissibly restricts the reading material available to inmates. We agree with those courts which have struck down such limitations as inconsistent with both the first amendment and due process. *See, e.g., Cruz* v. *Hauck*, 515 F.2d 322, 333 (5th Cir. 1975) ("publisher only" rule invalidated as to receipt of legal periodicals); *Rhem* v. *Malcolm*, 371 F. Supp. 594 (S.D.N.Y. 1974).[26] While it is true that the MCC's

[26] Appellants urge that we follow the reasoning of *Woods* v. *Daggett*, 541 F.2d 237 (10th Cir. 1976) to reach a contrary result. While *Woods* upheld a "publisher only" rule, it made clear it was doing so within the limited context before it:

> . . . Nevertheless, while the constitutional claim is not wholly insubstantial, when we consider the circumstances of the maximum security institution the size of Leavenworth, and the risks involved if searches of materials sent to such numbers of inmates should not detect contraband, we [sustain] the policy in question.

Certainly, the inmates at the MCC cannot be compared to the admittedly more dangerous population at Leavenworth and, accordingly, justification of security are far less compelling.



library collection mitigates some of the harshness of the rule, it is obvious that many books sought by inmates are available neither in the library nor directly from a publisher. And it is inconceivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles. *Benjamin* v. *Malcolm*, 75 Civ. 3073 (S.D.N.Y. November 18, 1975).

MCC personnel also randomly and routinely read outgoing, nonprivileged mail. The institution's administrators rationalize this inspection as a proper method of monitoring escape plans or other threats to security. Judge Frankel concluded that since social visits and telephone calls are not monitored, the mail security justification was meaningless. He ordered the facility to refrain from reading inmate correspondence absent good cause.

The postal carrier may not be turned back at the jailhouse gate. The right to receive and send mail is unquestionably protected by the first amendment. *Blount* v. *Rizzi*, 400 U.S. 410 (1971). *See also* Sigler, *Freedom of the Mails: A Developing Right*, 54 Geo.

L.J. 30 (1965). The Fifth Circuit, in *Taylor* v. *Sterret*, 532 F.2d 462, 481 (1976), recently observed:

> [c]orrespondence is a principal method available to prisoners to communicate with private and public individuals or entities . . . . Jail practices which inhibit this medium therefore create a serious impediment to a prisoner's communicative capability.

Indeed, in *Procunier* v. *Martinez*, *supra*, the Supreme Court acknowledged an inmate's interest in utilizing this basic medium when it struck down prison regulations permitting broad censorship of prison correspondence.

It cannot be gainsaid that the reading of mail by jail officials chills the expression of first amendment rights by corespondents inside and outside the institution. It takes little more than common sense to realize that a tender note, so important to the morale of the incarcerated individual, might never be penned if the writer knew that it would first be scrutinized by a guard.[27] And, certainly, where social visits and telephone calls are left unmonitored, a spurious claim of

[27] Judge Frankel observed that mail can still be inspected for contraband, and where good cause is shown, outgoing mail can be read. *See Sostre* v. *McGinnis*, 442 F.2d 178 (1971) (*en banc*), *cert. denied sub nom. Oswald* v. *Sostre*, 405 U.S. 978 (1972). We note, in addition, that Judge Frankel found no justification for the MCC's policy not to forward mail. We too fail to see any legitimate reason for the continuation of this restrictive practice.



security cannot vindicate infringement of so basic a right.[28]

*Unreasonable Searches and Seizures*

When an individual is detained, he or she unfortunately relinquishes some part of those rights to privacy and protection against unreasonable searches and seizures possessed by unincarcerated members of society. Yet, few will dispute that, whatever the circumstances, the existence of a realm in which privacy is safeguarded is fundamental to decent treatment of an inmate. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Indeed, every effort should be made to preserve those conditions which foster human dignity. *See Bonner* v. *Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975). Two practices at the MCC, the removal of inmates during room searches and bodily strip searches, denigrate this basic right.

a. *Strip Searches*

By far the most humiliating and degrading procedure at the MCC is the so-called "strip search." After receiving a visitor, every inmate is, without cause, routinely ordered to strip naked and to display his armpits and the bottom of his feet. If a

[28] In *Smith* v. *Shimp*, 562 F.2d 423 (7th Cir. 1977), the Seventh Circuit upheld a practice of reading outgoing, non-privileged mail. There is no indication in that opinion, however, whether other means of communication between inmates and outsiders were left unmonitored. In any event, we decline to follow the ruling of that court.

male, he must lift his genitals, and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates are also scrutinized. Judge Frankel left the basic strip-search procedures undisturbed, but found that anal and genital searches "plunge" the inmate into a "deep level of degradation and submission" not warranted by the record before him. *See* 439 F. Supp. at 147. He prohibited inspection of the genitals and anus unless there is probable cause to believe that the inmate is secreting contraband.

While other courts have permitted searches of body cavities where a substantial security justification has been demonstrated, in this case appellants proved only one instance in the several years of its existence when contraband was found during a body cavity inspection. The gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility. To speak plainly, in the circumstances presented by this record, the procedure shocks one's conscience. *See Rochin* v. *California*, 324 U.S. 167 (1952). Accordingly, we affirm Judge Frankel's order on strip searches.

b. *Room Searches*

During a formal "shakedown" at the MCC, a residential unit is cleared of inmates and a search conducted. Inmates are not permitted to observe searches of their rooms. Correctional officers also may bar an



inmate from viewing the more frequent "spot" searches of a particular room. The practice was instituted ostensibly to minimize conflict between residents and officers over the search, to remove possible distractions to those conducting the search, and to thwart attempts to conceal contraband.

Judge Frankel held that this procedure could not be countenanced when applied to pretrial detainees. He found that correctional officers often lacked any respect for the personal possessions of inmates and were far from neat, and sometimes destructive, in conducting searches. Indeed, since inmates suspected the officers of thievery, searches were a festering source of tension. In short, the practice in actual operation, constituted a "regime of absolute and unquestionable tyranny." [29]

We see no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege to grant him and reassures the detainee's already diminished sense of control over self, that he still has some small private domain, while at the same time not interfering with the institution's security concern and the removal of possible contraband. *See*

---

[29] 428 F. Supp. at 342. Judge Frankel also required that receipts be given for seized property, and that certain minimal procedures be provided for enabling an inmate to challenge a seizure. The basic principles of due process which require the institution to account for such property are so well-established that we need not dwell long in affirming this aspect of Judge Frankel's order. *See McClennon* v. *Rosetti*, 460 F.2d 111 (2d Cir. 1972).

*Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 (S.D. N.Y. 1975). And, of course, any detainee who becomes obstructive may be removed from the vicinity of his room.

c. *Packages*

Inmates at the MCC are not permitted to bring into the institution or to receive from the outside, items of personal property, including electric shavers, typewriters and wrist watches. Moreover, food packages, with the exception of one package at Christmas, are forbidden. Appellants defend these limitations, claiming that personal property brought into the jail would open the door to buying favors, gambling activities, and "strong arm tactics." The appellants also urge the food restrictions are necessary to avoid sanitation and storage problems.

Judge Frankel found these justifications meritless. He ordered the appellants to promulgate reasonable regulations to permit receipt of at least items of the sort available from the commissary.

Other institutions have far more liberal rules governing the receipt of packages than the severely restrictive regulations of the MCC. *See, e.g., Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836, 842 (S.D.N.Y. 1976) (New York City House of Detention); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 496 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 414 U.S. 977 (1974). And there is no indication that this greater liberality has resulted in



unmanageable difficulties. Since the district court's decree did no more than instruct the MCC to devise reasonable regulations regarding packages, it is not inconsistent with the tenet that prison officials should retain as much control as possible over their institutions. Appellants may appropriately place a ceiling on the permissible dollar value of goods received into the institution and restrict the number of packages. In so doing, it may satisfy its legitimate security and storage concerns but, at the same time, we are sure it will not impose draconian limitations.

d. *Typewriters*

Judge Frankel decreed that inmates should be permitted to possess typewriters, for their personal use. But we can perceive no constitutional right to a typewriter as an incident to the right of access to the courts. *See Tarlton* v. *Henderson*, 467 F.2d 200 (5th Cir. 1972). And while it may be true, as Judge Frankel poignantly noted, that "typed papers . . . leap more vividly than handwritten ones to the watery judicial eye," such a vivid rhetorical flourish on the value of the typewriter cannot justify a gross intrusion into prison administration. In short, the MCC's judgment that the particular problems of security, storage, and theft arising from inmates' ownership of typewriters must override the desire of some to possess them.[30]

---

[30] In any event, a limited number of typewriters—one on each residential unit—is provided to inmates. Their presence, coupled with the fact that most inmates are represented by

*Attire*

Neither pretrial detainees nor sentenced inmates at the MCC are allowed to wear their own clothes. Instead, they are issued colored jumpsuits. Appellees claim, and the trial judge found, that these jumpsuits are garish, ill-fitting, degrading and humiliating to wear. Accordingly, he required the MCC to permit pretrial detainees to wear their own clothes unless they volunteer to wear correctional uniforms.

We do not doubt that the jumpsuits are aesthetically obnoxious to some inmates. But the MCC has demonstrated a legitimate security interest in readily identifying inmates that outweighs the inmates' understandable desire to control their own appearance. *Cf. East Hartford Education Association* v. *Board of Education*, 562 F.2d 838, 860 (2d Cir. 1977) (*en banc*).

Certainly, the MCC could satisfy its need to easily identify inmates in a manner less degrading and humiliating by requiring, for example, that they wear shirts and pants of a certain type and color. Indeed, we urge them to do so. But we would be hard-pressed to decide that such questions—ultimately of taste—rise to "litigable magnitude" and are not issues to be resolved by prison administrators. *See* Kaufman, 39 Brooklyn L. Rev. xiii, xv (1973).

---

counsel and do not need typewriters on which to fashion legal documents, argue strongly against allowing personal possession of typewriters as a necessity for access to the court.

*Access to the Courts*

When this action was instituted, most attorney visits were made in the general visiting rooms during visiting hours—thereby entailing long delays, limiting the attorney's time with his client, and totally vitiating confidentiality. Moreover, attorneys frequently found it impossible to go to the MCC during the brief (4:30 to 6:30 p.m.) attorney visiting hours. Attorney visits at any other hours required 24 hour notice to the institution. As a result, an inmate's access to legal counsel was often severely constrained. Prior to trial, the MCC opened a special attorney visiting room and extended attorney visiting hours from 8 a.m. to 8 p.m., for seven days a week. The judgment requires the appellants to maintain this schedule.

Judge Frankel also ordered that the MCC make its law library physically accessible to inmates during reasonable hours, and that the library contain an adequate collection of federal law materials, including the addition of some volumes and the replacement of others. He required the appellants to provide access to state law materials upon request.

We affirm these orders. As we made clear in *Sostre* v. *McGinnis*, *supra*, 442 F.2d at 189, "[t]he Constitution protects with special solicitude, a prisoner's access to the courts." *See also Bounds* v. *Smith*, 430 U.S. 817 (1977); *Johnson* v. *Avery*, 393 U.S. 483 (1969). Indeed, one of the most serious deprivations suffered by a pretrial detainee is the curtailment of

his ability to assist in his own defense. And sentenced prisoners often experience similar frustrations in bringing their grievances to the attention of the courts. Appellants' prior practices in regard to both attorney visits and the law library unreasonably burdened the inmate's opportunity to consult with his attorney and to prepare his defense, and were properly enjoined. *See Zurak* v. *Regan*, 550 F.2d 86 (2d Cir. 1977).

VIII.

We regret the prolixity of this opinion, but the nature of the questions raised in the lower court and the accumulation of detailed complaints have made such length unavoidable if we were to deal properly with the trial judge's decree. In actuality, we have here decided not one, but twenty cases relating to specific conditions at the MCC.[31] That fact, in all candor, is ominous, for it represents the growing involvement of the courts in all aspects of prison administration. Of course, such intercession is anathema to prison administrators whose decisions are scrutinized. But, in many instances, the actions of the best intended courts are counterproductive for the inmates themselves, who could sooner find redress of their grievances through nonjudicial means, such as arbitration and mediation or in this case, the Bureau of Prisons' inmate grievance procedure.

---

[31] Except as noted in this opinion, the judgment of the district court is affirmed in all respects.



Perhaps, at this juncture, Elbert Hubbard's caution that a word to the wise is usually resented will not prove true. It is important for courts to involve themselves with those conditions that violate the Constitution. But it is equally important that courts be spared from adjudicating petty matters that do not rise to litigable magnitude and could be resolved more quickly and more satisfactorily by discussions between the inmate or his representatives and prison administrators.

## APPENDIX B

## UNITED STATES COURT OF APPEALS

### FOR THE SECOND CIRCUIT

---

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January one thousand nine hundred and seventy-eight.

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. WILLIAM H. TIMBERS

HON. THOMAS J. MESKILL
Circuit Judges

---

77-2035
77-2135

LOUIS WOLFISH, HELEN ROMERO, SHERMAN GREENE, ESTELLA FERNANDEZ, MARYANNE CALLAHAN, MARY JORDAN, RUTH SMITH, FRANCIS WOODS, CARMEN ESTRADA, BIRCHEL L. CARSON, WILLIE S. MCCARTHA, JR., CHARMAINE ROBINSON, MILDRED SKEETE, M. RUSSELL, GERALDINE HARKER, DORIS TORRS, CYNTHIS EDWARDS, and DANA DYNES, REALTORS-APPELLEES,

*v.*



UNITED STATES OF AMERICA, EDWARD H. LEVI, individually and as the Attorney General of the United States of America, NORMAN CARLSON, individually and as the Director of the Bureau of Prisons of the United States of America, LARRY TAYLOR, individually and as the Warden of the New York City Metropolitan Correctional Center of the United States of America, THOMAS J. CAHILL, individually and as the United States Attorney for the Southern District of New York, WAYNE B. COLBURN, individually and as the Director of the United States Marshals Service and FRANK A. JULIANO, individually and as the United States Marshal of the Southern District of New York, RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in part, reversed in part and the action be and it hereby is remanded in part to said district court in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

## APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of February, one thousand nine hundred and seventy-eight.

Present: HONORABLE IRVING R. KAUFMAN,
*Chief Judge.*

HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,
*Circuit Judges.*

---

77-2035

77-2135

UNITED STATES OF AMERICA EX REL.
LOUIS WOLFISH, ET AL., PETITIONERS-APPELLEES,

*—against—*

THE HONORABLE EDWARD LEVI, ET AL.,
RESPONDENTS-APPELLANTS.

---

Respondents-appellants having filed a motion to enlarge the time within which respondent-appellants



may petition for rehearing, or suggest rehearing en banc, to and including March 9, 1978 and to stay issuance of the mandate to April 24, 1978,

IS IS ORDERED:

1) The motion is hereby granted.

2) The final sentence beginning on page 1209 of the slip opinion is amended to read:

> Inmate testimony in *Detainees* revealed that double-celling had produced numerous disagreements over the choice of activities within the room, and had spawned fights. charges of theft, and frequent involuntary physical contact as two inmates passed each other in the narrow aisle of walking space.[18]

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

/s/ William H. Timbers
WILLIAM H. TIMBERS

/s/ Thomas J. Meskill
THOMAS J. MESKILL
Circuit Judges

## APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 MEF

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al., PETITIONERS

—*against*—

THE HONORABLE EDWARD LEVI; NORMAN A. CARLSON, Director, United States Bureau of Prisons; LARRY TAYLOR, Warden, Metropolitan Correctional Center, RESPONDENTS

PARTIAL JUDGMENT

FRANKEL, D. J.:

The petitioner class which, by order of this Court dated December 23, 1975, consists of all persons who are or will be confined in the Metropolitan Correctional Center ("MCC"), 150 Park Row, New York, New York having moved this Court for partial summary judgment; and the respondents having moved for partial summary judgment; and the Court having ordered summary judgment with respect to double-celling; receipt of books, periodicals, and other materials; receipts for the seizure of inmate possessions; and mail; and the Court having granted partial summary judgment in favor of the respondents on other issues; and the Court having heard testimony and received other evidence as to other issues in the



case; and the Court having considered the affidavits, transcripts, exhibits, and memoranda, and having toured the facility; and having considered all papers and proceedings herein; and the Court having dismissed certain of petitioners' claims at the close of their case; and the Court having rendered its decision and issued an opinion on September 15, 1977 on all the issues except those relating to health care; and there being no just reason to delay entry of this partial judgment, now therefore judgment is entered and it is hereby

ORDERED that respondents, their agents, employees, and successors, and all persons acting in concert with them, be, and they hereby are, enjoined from confining any member of the petitioner class at MCC except under the following conditions:

*CLASSIFICATION*

(1) (a) Within 90 days of entry of this partial judgment respondents shall prepare and institute a system to classify and separate pretrial detainees from sentenced inmates, and classify and separate those inmates who pose a serious threat of violence, escape or attempt to escape from those inmates who do not pose such dangers. Said system of classification and separation shall include the following exceptions:

(i) respondents are permitted to assign both pretrial detainees and sentenced inmates to the following housing units at the MCC:

(A) the women's unit;

(B) the protective custody unit;

(C) the high security unit;

(D) the hospital.

(ii) At any time when the MCC is approaching its capacity, either overall or as to a particular type of unit under this classification system, respondents shall use their best efforts to maintain the classification and segregation set forth above and, at such times, should an inmate be assigned to a unit not otherwise the properly designated one (i.e., a pretrial detainee assigned to a sentenced unit), respondents shall reassign such inmates to the properly designated unit as soon as a room becomes available in such unit.

(b) For the purposes of this order, an inmate convicted of a state, local or federal offense who is at the MCC pursuant to a writ from any local, state or federal correctional, detention or penal institution, whether or not said inmate still has other criminal charges pending against him, shall be considered and classified in the same category as a sentenced inmate and shall not be considered or classified as a pretrial detainee.

*LENGTH OF CONFINEMENT AT THE MCC*

2(a) Within 14 days after entry of this partial judgment, no inmate incarcerated or detained at the MCC on that date or subsequent thereto may be in-



carcerated or detained at the MCC for a period of more than 60 consecutive days without said inmate's voluntary written consent thereto.

(b) As soon as it is known by officials at the MCC that an inmate's incarceration or detention at the MCC will exceed 60 consecutive days, and in any event no later than one week prior to expiration of the aforesaid 60 day period, the inmate shall be informed, by written communication, of his or her right to be transferred from the MCC. Within five days after an inmate is advised of his or her right to be transferred under this provision, said inmate shall advise the MCC in writing whether he or she wishes to be transferred or whether he or she wishes to waive transfer and remain at the MCC. Nothing contained herein shall preclude the respondents from transferring an inmate from the MCC at any time before or after expiration of the aforesaid 60 day period.

(c) Within 14 days after entry of this partial judgment, the respondents shall prepare a written form for use in notifying those inmates to whom paragraph 2(b) applies of their rights under paragraph 2(a) and (b); said form shall also include the following:

(i) A space wherein the inmate shall notify the MCC, in writing, of his or her decision to exercise his or her right of transfer or waive said right, acknowledging that said decision is being made voluntarily;

(ii) A space to indicate the legal status of the inmate (*i.e.*, pretrial or sentenced) and the date the inmate was discharged or transferred from the MCC.

(d) Respondents shall maintain and keep a file of all forms executed by inmates pursuant to paragraph 2(b) and (c), and said file shall be available for inspection and copying, upon reasonable notice, by counsel for petitioners.

*MUSLIMS' DIETARY REQUIREMENTS*

3(a) Respondents are hereby enjoined from providing observant Muslim inmates pork-free meals which consist of deleting the pork item from the meal and substituting an extra helping of potatoes or other vegetable.

(b) Respondents shall forthwith provide observant Muslims with the same pork-free meals provided to observant Jews or shall provide said observant Muslims with meals which are substantially identical in nutritional value to those served to observant Jews.

*LAW LIBRARY*

4(a) Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a plan to provide inmates who are *pro se* in any criminal or civil proceeding pending in any court with physical access for reasonable periods of time to adequate law library facilities for the purpose of preparing the documents by which to commence, maintain or defend such a proceeding notwithstanding that the court before which the inmate is appearing has the discretion to appoint counsel once the action has begun (18 U.S.C. § 3006(A)(j)), and whether or not the inmate is represented by counsel in another proceeding. Nothing contained herein shall limit the right of the respondents to deny an inmate physical access to said law library subsequent to the appointment or retention of counsel in the proceeding in which said inmate had therefore proceeded *pro se*.



(b) The means by which respondents may choose to comply with the requirements of paragraph 4(a) include but are not limited to transporting the affected inmates to local law libraries, expanding the law library facilities and materials at the MCC and permitting the affected inmates physical access to that law library, and establishing a program of legal services within the MCC.

(c) Should respondents elect to comply with the provisions of paragraph 4(a) by providing the affected inmates with physical access to the law library facilities within the MCC, respondents shall undertake as part of their compliance the following measures:

(i) Prepare an updated and accurate list of all volumes contained in the MCC law library;

(ii) Acquire and maintain as part of the MCC law library (and to be included in the list described in paragraph 4(c)(i)) one set of the Federal Second and Federal Supplement series extended back to

1950; volumes presently missing from the series now stocked; a complete set of the Modern Practice Digest series; and add the Federal Practice Digest Second series. Said additions to the law library shall be made within 90 days of the Court's approval of the respondents' plan for compliance;

(iii) Provide inmates with access to state law materials through some lending arrangement with local law libraries;

(iv) Provide adequate space for the law library so that a reasonable number of inmates may use the facilities at the same time.

(v) Schedule the hours of operation for the law library so that it is available for inmate use five days per week, for a reasonable period each day.

5(a) Respondents shall not prohibit inmates at the MCC from acquiring or possessing their own typewriters while incarcerated or detained at the MCC.

(b) Respondents may inspect said personal typewriters for contraband before permitting the inmate to possess and maintain said typewriter at the MCC.

*COMMISSARY*

6(a) Inmates at the MCC shall be permitted to submit purchase orders to the MCC commissary on an every other day basis. A purchase order shall be filled by the MCC and delivered to the ordering inmate within 24 hours after submission of the order.

(b) The commissary order form provided to inmates shall include a provision for the inmate to



make a second choice among the available items in the event that one or more of the inmate's first choice of items is not available.

(c) Nothing contained herein shall preclude the respondents, if they choose, from establishing a commissary system which provides inmates with direct access to the commissary on an every-other-day basis.

(d) Respondents are hereby enjoined from endorsing checks or money orders made to the order of an inmate without the inmate's written consent thereto. Respondents may endorse an inmate's check or money order only on written consent of the inmate after written notice that he may refuse to give such consent and that in the event of refusal to consent, respondents will permit said inmate to endorse checks and money orders. Nothing contained herein shall be interpreted to require separate written consent for each check or money order in the event that an inmate has signed the above described notice and consent form. An inmate who has given the above-described consent may, upon written notice delivered to his or her unit manager, revoke said consent.

(e) Respondents shall credit checks to the appropriate inmate's commissary account within 15 days in the case of checks drawn on a bank located within the continental United States, and within 30 days in the case of checks drawn on a bank located outside the continental United States, from the date that

(i) the check is received and endorsed by the MCC pursuant to the inmate's consent as set forth in paragraph 6(d); or

(ii) the inmate gives the check to the MCC after said inmate has personally endorsed the check pursuant to paragraph 6(d).

The 15-day and 30-day period set forth herein may be extended for a longer period for good cause communicated to the inmate in writing.

*CAPACITY OF MCC*

7. Within 60 days of entry of this partial judgment, and except as provided in paragraph 9(b) below, respondents shall not house more than 10 inmates in each of the six dormitory rooms on Unit 11 South at the MCC, or more than a total of 60 inmates in that unit.

8. Within 30 days of entry of this partial judgment, and except as provided in paragraph 9(b) below, respondents shall not house inmates on beds placed in corridors, balcony areas or commons areas.

9(a) Except as set forth below, the inmate population at MCC shall not be permitted to increase to more than 449 inmates, to be allocated among the units as follows:

| | |
|---|---|
| 2nd Floor | Not more than 29 inmates |
| 3rd Floor | Not more than 24 inmates |
| 5-N | Not more than 48 inmates |
| 5-S | Not more than 48 inmates |
| 7-N | Not more than 48 inmates |
| 7-S | Not more than 48 inmates |
| 9-N | Not more than 48 inmates |
| 9-S | Not more than 48 inmates |
| 11-N | Not more than 48 inmates |
| 11-S | Not more than 60 inmates |



(b) In the case of an emergency certified in writing by the Warden, and for a period not to exceed ten days, the capacity of the MCC may be increased beyond 449 as set forth above by temporarily housing more than 10 inmates in one or more of the dormitory rooms on Unit 11 South, or housing inmates on beds on a corridor, balcony or commons area in one or more of the units, or by placing two inmates in one or more of the individual rooms throughout the MCC. In the event of such an emergency, a copy of the written certification from the Warden shall promptly be forwarded to the Court and counsel for petitioners; said certification shall set forth the facts underlying and the reasons for invoking this emergency provision and shall indicate the present extent of the increase in capacity above 449, and the expected duration of the emergency. By the end of the aforesaid 10 day period, the inmate population at MCC shall be at or below 449 unless this Court, by specific order, permits otherwise.

*SOCIAL AND FAMILY VISITING*

10. Respondents shall maintain and continue the following hours, practices, and procedures for family and social visits at the MCC:

(a) Visiting hours at the MCC shall be maintained as set forth below:

| Days | Hours | Unit |
|---|---|---|
| Tues-Friday | 12:30 PM to 4:00 PM<br>5:30 PM to 8:30 PM | All Units |
| Saturday | 8:30 AM to 12:00 PM | 3, 7N, 7S, 11N, 11S |
| | 12:30 PM to 4:00 PM | 2, 5N, 5S, 9N, 9S, 11S |
| Sunday | 8:30 AM to 12:00 PM | 2, 5N, 5S, 9N, 9S, 11S |
| | 12:30 PM to 4:00 PM | 3, 7N, 7S, 11N, 11S |

When Monday is a legal government holiday, the Sunday visiting schedule shall prevail.

(b) Notwithstanding the provisions contained in paragraph 10(a) above, respondents are permitted to reduce the visiting hours for the 11-South Dormitory Unit by 3½ hours on either Saturdays or Sundays at such time as that unit is reduced to a population of 60 inmates pursuant to paragraphs 7 and 9 above.

(c) The bathrooms located in the visiting rooms shall be kept open for use by visitors (but not inmates) and shall be locked only by the visitor using such facility.

(d) Each inmate shall be entitled to receive three visits per week. Conditions permitting, the maximum visiting time per visit shall be the entire visiting period. In the event of overcrowding (more than 25 persons in any visiting room), the visiting room officer may reduce the visiting time allowed, but in no event may the duty officer reduce a visit to less than one hour. Only in the event of extreme overcrowding, and then only when that determination is made by



the duty correctional supervisor, may a visit be shorter than one hour. In the event of such extreme overcrowding, visiting hours may be extended.

(e) Visits are limited to three persons visiting one inmate at a single time. An inmate's children under the age of 16 are not included in this three-person limit. If additional family members are present, the visit should be divided into two groups, each group visiting for half the allotted visiting period. Each visiting period shall be counted as one visit for purposes of calculating the number of visits allowed per week.

(f) Each inmate shall be permitted to identify six friends or relatives for his or her approved visitors list. Children under the age of 16 are not to be counted in the limitation of six visitors. Inmates shall be permitted regular opportunities, but not more than once per week, to change the names of visitors on their approved list.

(g) Respondents shall continue to authorize special visits under circumstances authorized prior to this order.

(h) The hours and procedures described in paragraph 10(a) through (g) may be reduced or diminished only after notice to the Court and counsel for petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

*ATTORNEY VISITS*

11. Respondents shall maintain and continue the following hours, practices, and procedures for attorney visits at the MCC:

(a) Attorney visits shall be permitted from 8:00 a.m. to 8:30 p.m., seven days per week, with no requirement that prior notice of the visit be given except when special accommodations or facilities are necessary;

(b) The attorney conference room on the third floor, consisting of five individual rooms with doors and a large, common space provided with tables, shall be maintained;

(c) The MCC shall continue to expedite the processing of attorneys;

(d) The special filing cabinets for inmate visitors' lists shall be maintained;

(e) Respondents shall continue to monitor the attorney conference area to assure that attorneys are given prompt entrance to and exit from the conference area; and

(f) Attorneys shall be given, after processing, an identification pass and will be permitted to proceed unescorted except if, on a case-by-case basis, it is determined by respondents that such unescorted access would pose a threat to the security of the institution or individuals therein; and

(g) The hours and procedures described in paragraph 11(a) through (f) may be reduced or diminished only after notice to the Court and counsel for



petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

*VISITS WITH CO-DEFENDANTS*

12. Respondents shall permit co-defendants in a case who are incarcerated or detained at the MCC to engage in joint legal visits unless a specific court order is in force directing otherwise.

*TELEPHONES*

13. Respondents shall continue to provide telephone service for inmates at MCC as set forth below.

(a) Local calls

The current total of 23 pay telephones shall continue to be "restricted dialing," permitting calls to only the 212 area code. The distribution of these telephones shall remain as follows:

| Unit | Number of Pay Telephones |
|---|---|
| Honor Unit | 1 |
| Hospital Unit | 1 |
| 3 | 2 |
| 5-N | 2 |
| 5-S | 2 |
| 7-N | 2 |
| 7-S | 2 |
| 9-N | 2 |
| 9-S | 2 |
| 11-N | 3 |
| 11-S | 4 |

These telephones shall continue to be available for inmate use from 6:30 a.m. to 11:00 p.m., except during counts or emergencies.

(b) Long-distance calls

(1) Respondents shall continue to operate 22 long-distance telephones on an 11 trunkline system routed through the MCC switchboard. These long-distance telephones shall continue to be distributed as follows:

| Unit | Number of Long-Distance Telephones |
|---|---|
| Honor Unit | 2 |
| 3 | 2 |
| 5-N | 2 |
| 5-S | 2 |
| 7-N | 2 |
| 7-S | 2 |
| 9-N | 2 |
| 9-S | 2 |
| 11-N | 2 |
| 11-S | 4 |

(2) Inmates shall continue to be permitted to make (i) collect calls without following the procedures hereinafter described in subparagraphs (A) through (F); and (ii) calls charged to their commissary accounts in the manner hereinafter described in subparagraphs (A) through (F) through the MCC long-distance switchboard. Advance written authorization by the inmate shall be required for each call an inmate wishes to charge to his commissary account. Such a commissary charge shall be made in the following manner:



(A) An inmate must convey a written authorization for each commissary charge call, including the telephone number to be called, to the MCC commissary by presenting such authorization to a designated housing unit officer. A separate authorization must be submitted for each such call;

(B) If the inmate's commissary account has a balance of at least $10 and the requested charge call is within the continental United States, the written authorization for a commissary charge call must be presented to the designated housing unit officer at least four hours prior to the time the inmate wishes to place the call, and upon its approval by the MCC commissary, the said authorization shall be delivered to the long-distance operator;

(C) An inmate whose commissary account reflects a balance of less than $10 or who wishes to charge a call to a destination outside the continental United States shall present the required authorization to the designated housing unit officer at least 24 hours in advance of the time the inmate wishes to place the call so that MCC officials may confirm in advance that the inmate's account reflects sufficient funds to pay for the cost of the call;

(D) At the time an inmate wishes to make a commissary charge call for which he has previously submitted written authorization as provided in (2)(A) through (2)(C), said inmate using the long-distance telephone in his housing unit, (i) shall identify himself to the long-distance operator, and (ii) shall iden-

tify the call he wishes to charge to his commissary account. The operator, upon determining that the inmate has provided the appropriate written authorization and that the MCC commissary has approved said call, shall place the call;

(E) Inmates shall be provided a written receipt for each commissary charge call made; and

(F) If an inmate's commissary account contains insufficient funds to meet the requirements of (2)(B) or (2)(C) above, the long-distance operator shall not place the requested commissary charge call.

(c) Miscellaneous provisions for long-distance calls.

(1) All long-distance calls shall be limited in length to 10 minutes. This 10-minute period shall commence when the called party answers the telephone.

(2) A sign-up list shall be posted near each long-distance telephone for collect and pre-paid calls in order to encourage orderly and equitable use of the telephones.

(3) Emergency need for a telephone, including instances in which an inmate does not have funds to pay for a needed telephone call, shall be handled on a case-by-case basis, as is the current MCC policy.

(4) Inmates lodged in the hospital unit shall be given access to long-distance telephones on an individual basis.

(5) The long-distance switchboard shall be open eight hours each day, seven days per week, except during counts or emergencies, from 1:00 p.m. or 7:00



p.m. to 9:00 p.m. or 11:00 p.m. as respondents may determine.

(6) Nothing contained herein shall prohibit the respondents from requiring inmates to make telephones calls to destinations overseas through the institutional telephone system rather than the above-described long distance telephone system.

(d) The hours, procedures and facilities described in paragraphs 13(a) through (c) above may be reduced or diminished only after notice to the Court and counsel for petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

*MAIL*

14(a). Respondents and their employers shall open incoming "Special Mail" only in the presence of the inmate for inspection for physical contraband.

(b) "Special Mail" shall include any letter from any of the following persons or institutions:

(i) letters from attorneys;
(ii) letters from federal courts;
(iii) letters from state courts;
(iv) letters from members or committees of Congress;
(v) correspondence from embassies and consulates;

(vi) correspondence from the United States Department of Justice or any of its divisions;
(vii) correspondence from state governors;
(viii) correspondence from state attorneys general; and
(ix) correspondence from prosecuting attorneys.

15. Respondents shall forward mail received at the MCC for an inmate who has been transferred to another institution or who has been released.

*SEARCHES*

16(a). Respondents and their employees are enjoined from conducting a visual search of the anus or genitals of an inmate, except that respondents and their employees are permitted to require an inspection of the genitals and anus upon a specific and particular showing of probable cause to believe that the inmate is concealing contraband in his or her genital or anal area. Such probable cause must be recorded in writing, upon sworn statements of first-hand knowledge, with a written record of the reasons, results, and circumstances of each such search. A copy of such written record shall be given to the inmate, and a copy shall be maintained and preserved by the respondents. In the event such examination occurs, it is to be conducted in private and in the presence of only those persons whose presence is essential for reasons of security.

(b) Nothing contained in paragraph 16(a) shall limit the right of respondents and their employees to



require an inmate to undergo the following inspection after a contact visit:

(i) Remove all clothing including underwear;
(ii) Raise arms, present open hands, lift feet, run fingers through hair and open mouth;
(iii) Have all clothing inspected.

Said inspection shall be conducted in private, in the presence of only those persons necessary for security.

17(a). Each pretrial detainee, excluding writ cases as set forth in paragraph 1(b) above, shall be permitted to observe a search of the residential room, or sleeping space within a dormitory room, to which said detainee has been assigned, except that should a detainee attempt to disrupt the search of his or her room or dormitory space or remove anything from his or her room or dormitory during the search said detainee may be removed from the area of the search and the search may be continued without said detainee's presence.

(b) Notwithstanding the requirements of paragraph 17(a) above, individual residential rooms within the MCC or the six dormitory rooms in Unit 11 South to which pretrial detainees are or may be assigned may be searched, without the presence of the detainee, upon a showing of good cause approved in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden. At the time of such a search or as promptly thereafter as practical, each detainee whose room or dormitory space was searched pursuant to

this provision shall be given written notice of said search.

*SEIZURE OF CONTRABAND*

18. Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a statement of procedures by which an inmate may contest the confiscation and forfeiture of personal property. Said procedures shall provide for the following:

(a) A brief statement to the inmate setting forth the basis for the seizure;

(b) Notice to the inmate of the right to respond in a reasonably simple and convenient manner, and to assert grounds, if any, why the seizure is claimed to be unwarranted;

(c) A suitable opportunity to meet and answer controverted evidence thought to warrant confiscation;

(d) A decision setting forth reasons, however brief.

*PACKAGES*

19. Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a set of regulations permitting inmates to receive packages from outside the MCC. Said regulations shall include specifications as to the volume, frequency and character of the packages inmates will be permitted to receive, and the inspection



procedures to be used in connection with receipt of such packages.

*UNIFORMS*

20(a). Sixty days after entry of this partial judgment:

(i) Respondents are enjoined from requiring inmates at the MCC to wear the jumpsuit uniforms presently in use at the MCC.

(ii) Pretrial detainees at the MCC shall be permitted to wear their own clothing unless they consent to wear the uniforms described in paragraph 20(a)(iv) below.

(iii) Sentenced inmates shall be permitted to wear their own clothing unless the respondents provide said inmates with the uniform described in paragraph 20(a)(iv) below; upon the issuance of said uniforms, sentenced inmates may be required to wear said uniforms rather than their own clothes. A sentenced inmate may wear the jumpsuits presently in use at the MCC only if said inmate volunteers to wear the jumpsuit.

(iv) Uniforms at the MCC shall consist of the following:

(A) Men: shirts and trousers; the respondents may, but are not required to, issue other conventional items;

(B) Women: dresses, or blouses with skirts or slacks; the respondents may, but are not required to, issue other conventional items.

(v) Uniforms issued by respondents shall reasonably fit the wearer.

(b) Inmates shall be permitted to wear their own undergarments or, if respondents choose, shall be provided with new ones.

(c) In connection with the implementation of paragraph 20(a) above, respondents may prescribe and implement reasonable rules and regulations regarding the amount and type of personal clothing that a pretrial detainee or sentenced inmate, if applicable, may possess at the MCC, and the procedures whereby and frequency with which said inmates may receive or exchange personal clothing items from outside the MCC.

(d) The requirements set forth herein are subject to reconsideration and modification by the Court upon due notice and hearing.

*FOOD SERVICE*

21. Within 30 days of entry of this partial judgment, respondents shall issue and enforce a new statement of regulations which require all employees, civilian or inmate, working in food preparation, storage, and service to wear hand and head coverings while handling food.

*EXERCISE DURING CONFINEMENT IN ADMINISTRATIVE DETENTION*

22. Inmates placed in administrative detention, either in their regular housing unit or in a special unit designated for administrative detention, shall



normally be provided, consistent with existing available resources and the security needs of the unit, with an opportunity for one hour of outdoor exercise per day. In the event that an inmate in administrative detention is not provided with the opportunity for one hour of outdoor exercise per day, the inmate shall be informed, in writing, by the Chief Correctional Officer, an Associate Warden or the Warden of the reasons for not being provided with that opportunity.

*LOCK-IN ON UNIT 5-SOUTH*

23. Respondents are hereby enjoined from the practice of locking inmates assigned to unit 5-South into the rooms in that unit without toilet facilities for administrative detention, disciplinary segregation, unit-wide emergencies or any other reason, except that an inmate who has become violent or presents a clear and present danger of violence or escape may be locked into one of those rooms for not more than 15 minutes pending transfer to another room with toilet facilities.

*STAFF*

24. MCC correctional officers and other staff at MCC are enjoined from entering the rooms, toilets and shower rooms used by inmates of the opposite sex unless the said correctional officer or staff member first knocks on the door or announces his or her presence and gives suitable warning to the inmate that

said officer or staff member is about to enter the area, except that said notice may be omitted: (a) in an emergency, or (b) during the hours of 11:00 P.M. to 6:30 A.M. when inmates are normally asleep.

*PARTIAL SUMMARY JUDGMENT ORDER*

25. This Court's partial summary judgment order dated January 19, 1977 is incorporated herein by reference.

*PETITIONERS' CLAIMS THAT ARE DISMISSED*

With respect to the following claims asserted by the petitioners in the amended complaint dated January 12, 1976, the amendments to the amended petition dated November 17, 1977, or at the trial of this action, judgment is hereby entered against the aforesaid petitioner class dismissing said claims with prejudice and on the merits:

26. All claims set forth in paragraph 6 of the amended petition, except as specifically provided above.

27. All claims set forth in paragraphs 7 through 18 of the amended petition, and as amended by paragraphs 10 and 11 of the amendments to the amended petition, except as specifically provided above.

28. All claims set forth in paragraphs 19 through 27 of the amended petition except as specifically provided above.



29. All claims set forth in paragraphs 46 through 54 of the amended petition except as specifically provided above.

30. All claims set forth in paragraphs 55 through 68 of the amended petition and as amended by paragraph 60 of the amendments to the amended petition, except as specifically provided above.

31. All claims set forth in paragraphs 69 through 75 of the amended petition.

32. All claims set forth in paragraphs 76 through 85 of the amended petition.

33. All claims set forth in paragraphs 86 through 98 of the amended petition except as specifically provided above.

34. All claims set forth in paragraphs 99 through 102 of the amended petition except as specifically provided above.

35. All claims set forth in paragraphs 103 through 105 of the amended petition except as specifically provided above.

36. All claims set forth in paragraphs 106 through 108 of the amended petition.

37. All claims of paragraph 109 of the amended petition except as specifically provided above.

38. All claims set forth in paragraphs 110 through 113 of the amended petition except as specifically provided above.

39. All claims set forth in paragraphs 114 through 117 of the amended petition except as specifically provided above.

40. All claims set forth in paragraphs 118 through 124 of the amended petition.

41. All claims set forth in paragraphs 125 through 128 of the amended petition except as specifically provided above.

42. All claims set forth in paragraphs 129 through 132 of the amended petition except as specifically provided above.

43. All claims set forth in paragraphs 133 through 138 of the amended petition.

44. All claims set forth in paragraphs 139 through 142 of the amended petition.

45. All claims set forth in paragraphs 143 and 144 of the amended petition except as specifically provided above.

46. All claims set forth in paragraph 145 of the amended petition.

47. All claims set forth in paragraphs 146 through 149 of the amended petition.

48. All claims set forth in paragraphs 150 through 154 of the amended petition except as specifically provided above.

49. All claims set forth in paragraphs 150(a) of the amendments to the amended petition.

*STAY*

50. (a) The following portions of this partial judgment are hereby stayed for an initial period of ten (10) days from the date of entry of this partial judgment.



(i) Paragraphs 1, 4, 9, and 20.

(b) Upon respondents' filing a notice of appeal from this partial judgment within the above-described ten (10) day period, the aforesaid stay shall be automatically extended and remain in effect until the Court of Appeals renders its decision on the appeal in this case.

(c) Notwithstanding the stay set forth in paragraphs 50(a) and 50(b) above, respondents shall begin to prepare the reports, statements, rules or regulations required by paragraphs 1, 2, 4, 19 and 20(c) above; respondents shall have those reports, statements, rules or regulations ready for submission to the Court and counsel within the time periods set forth in paragraphs 1, 2, 4, 19 and 20(c) above, respectively, except that respondents shall not be required to submit the reports, statements, rules or regulations under paragraphs 1, 4, and 20 to the Court or counsel during the pendency of the stay provided herein and until further order of this Court or the Court of Appeals.

Dated: New York, New York
Oct. 13, 1977

/s/ Marvin E. Frankel
MARVIN E. FRANKEL
United States District Judge

## APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000

UNITED STATES OF AMERICA ex rel. LOUIS WOLFISH, HELEN ROMERO, CHARMAINE ROBINSON, MARYANNE CALLAHAN, GERALDINE HARKER, FRANCIS WOODS, DANA DYNES, WILLIE S. MCCARTHA, ESTELLA FERNANDEZ, MARGARET RUSSELL, RUTH SMITH, CYNTHIA EDWARDS, BIRCHEL L. CARLSON, SHERMAN GREENE, MILDRED SKEETE, MARY JORDAN, DORRIS DORRS, CARMEN ESTRADA, JEREMIAH O'SULLIVAN, MAXIMA VIDAL ORTIZ, ANTHONY VICTORY, JANET FALLEY, GORDON HAGEN, GARRY LEE, LINDA SESSOMS, ET AL., PETITIONERS

*—against—*

THE HONORABLE EDWARD LEVI,
Attorney General of the United States;
NORMAN CARLSON, Director, U.S. Bureau
of Prisons; and
LARRY TAYLOR, Warden, Metropolitan
Correctional Center, et al., RESPONDENTS

ORDER

FRANKEL, D.J.

The petitioner class, consisting of all persons who are or will be confined at the New York Metropolitan Correctional Center ("MCC"), 150 Park Row, New York, New York, 10007, having moved this court for partial summary judgment on certain of the issues



in this case, and the respondents having opposed summary judgment on certain of those issues and having cross-moved for summary judgment in their favor on others of those issues, and the court having considered the affidavits, transcripts, exhibits, and memoranda submitted by both sides and having heard oral presentations by counsel for both sides and having toured the MCC, and having considered all of the other papers and proceedings heretofore had herein, and the court having issued an opinion dated January 5, 1977; it is hereby

ORDERED that respondents, their agents, employees, and successors, and all persons acting in concert with them be and they hereby are enjoined from confining any member of the petitioner class at MCC except under the following conditions:

1. SINGLE CELL OCCUPANCY

Within 60 days after the date of this order, respondents shall eliminate all instances in which more than one person is housed at the same time in any one of the 389 residential rooms at MCC (i.e., exclusive of the dormitory unit on 11 South); thereafter, respondents shall not house more than one person in any one of those rooms at the same time.

2. RECEIPT OF BOOKS, PERIODICALS AND OTHER READING MATERIAL

a. Regardless of the source, respondents shall deliver to petitioners any books, periodicals, or other

reading materials mailed or sent to petitioners or hand-delivered to an official at the institution designated by respondents to receive such materials.

b. Respondents may inspect such materials for contraband before delivering them to petitioners; provided that inspection shall be accomplished with the least possible damage to the reading material and that such damage shall be fully repaired, or repaired to the fullest extent possible, with maximum feasible speed unless contraband, duly and promptly determined to be contraband, has been detected therein.

3. RECEIPTS FOR THE SEIZURE OF ITEMS

Any petitioner from whom an item of property is seized shall be provided with a written receipt for such item; said receipt shall identify the petitioner; the item seized; the date, time, and location of the seizure; the prison official who effectuated the seizure; and the reason for the seizure.

4. MAIL

a. Respondents shall not read incoming mail from attorneys or courts in any circumstances, and may read incoming mail from persons other than attorneys or courts only upon a showing of good cause approved and determined in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden, and then only in the presence of the addressee.



b. Petitioners may seal all outgoing mail before placing it in a mailbox in their housing unit; respondents may inspect outgoing mail by electronic or other devices to detect hidden objects, but without opening the letters; upon detecting enclosed objects, or upon substantial cause for believing there are hidden objects in the envelope, respondents may open outgoing mail, other than mail to attorneys or courts, and examine the contents for contraband; respondents may read such outgoing mail so opened only upon a showing of good cause approved in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden, and then only in the presence of the petitioner-sender.

IT IS FURTHER ORDERED that so much of the amended petition as seeks an order enjoining respondents from opening and inspecting mail from persons other than petitioners' attorneys or the courts, except in the presence of the petitioner-addressee, and any incoming mail except upon a showing of good cause, is dismissed with prejudice; and that petitioners' motion for partial summary judgment and respondents' cross-motion for partial summary judgment are in all other respects denied.

Dated, New York, New York
January 19, 1977

MARVIN E. FRANKEL
United States District Judge

## APPENDIX F

UNITED STATES DISTRICT COURT

S.D. NEW YORK

No. 75 Civ. 6000

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH et al., PETITIONERS

*v.*

EDWARD LEVI et al., RESPONDENTS

Sept. 15, 1977

As Amended Sept. 26, 1977

## OPINION

FRANKEL, District Judge.

In the explosively growing field of law about prison conditions lately developed in the federal courts, this case has one relatively rare feature: it concerns conditions in one of our own, *federal* places of confinement. The institution in question is the Metropolitan Correctional Center (MCC) adjoining this courthouse. The action was brought for the MCC's involuntary occupants (both male and female) as a class, embracing the pre-trial detainees for whom the facility was primarily designed, sentenced prisoners either awaiting assignment to a prison facility or assigned here to serve their (usually relatively short) terms, prisoners here on writs to testify or to stand



trial, witnesses in protective custody, and persons incarcerated for contempt.[1] Initially brought and conducted largely or wholly by the first-named petitioner, who has since been assigned elsewhere, the case for petitioners was assigned by the court to the Federal Defender Services Unit of the Legal Aid Society, which has proceeded with a quality of resourceful and dauntless vigor for which the court records its appreciation.

The petitioners have lodged a long roster of complaints resting upon an array of constitutional and statutory theories. Some issues have been decided upon motions for summary judgment. Thus, upon affidavits recounting undisputed facts, supplemented by the court's physical views of the premises, the transformation of rooms designed for single occupancy into double rooms was held unlawful and enjoined. 428 F.Supp. 333 (Jan. 5, 1977). Along with that determination, the court invalidated (1) a rule allowing petitioners' receipt of literature directly from publishers and from substantially no other source, (2) a practice of seizing property from inmates without giving receipts for it, and (3) the opening of inmates' outgoing mail. Id. Those determinations were accompanied by denials of petitioners' complaints regarding inspection of non-legal mail.

---

[1] The propriety of continuing the case as a class action was confirmed by an order dated December 23, 1975, in which the class was defined as "all persons detained in the Metropolitan Correctional Facility."

At earlier times, upon applications for interlocutory relief, the court issued preliminary injunctions relating to the MCC's telephone service and forbidding any change in visiting hours without notice to the court and petitioners.

Trial of the many questions still to be decided began on February 28 and extended, with some interruptions and truncated days, through March 30, 1977. In addition to the live testimony of inmates, attorneys, correctional personnel (including the Warden and Bureau of Prisons Director), and various experts, the court has considered deposition testimony, voluminous exhibits, and the observations made in two further visits to the MCC. These materials, as compounded and alchemized in post-trial memoranda and affidavits approaching a total of 1,000 pages, generate the findings and conclusions that follow.

In advance of enumerating what the court has decided, and why, it has seemed convenient to begin with a general description of the MCC, and then to sketch preliminarily the principles and restrictions (by no means fixed and certain) governing the involvement of federal judges in the conditions and management of federal prison facilities. Against these background observations, the facts and dispositions with respect to each subject of controversy will be the subject of our third, and lengthiest, chapter.

## I.

The MCC, which opened on August 2, 1975, has an appearance, and results from a course of planning,



markedly divergent from the bestial traditions of the American jail.[2] However well or ill they succeeded, a question we must presently address, those who conceived and designed this institution strove to be humane. They undertook to plan not merely for security and efficiency, but for modest amenities that might rescue from the wretchedness of incarceration some remnants of privacy, self respect, and, even, dignity. The MCC, at least upon first sight, is markedly different from the familiar pattern of barred cages, gray corridors, and clanging gates comprising the standard image.

Two features of the institution have basic significance for its structural character and some of the major complaints lodged by petitioners. First, built in a congested part of a congested City, next to our court building, it is 12 stories tall and has no open ground around it for recreational or other uses. Second, the five floors of the building housing inmates are divided into "functional," or "modular," units reflecting a carefully conceived idea of how best to organize relatively complete programs within subdi-

---

[2] American jails, which characteristically, if ironically, house minor offenders and presumptively innocent people awaiting trial under conditions far more wretched than those of the prisons, have generated shelves of depressing literature. See, e.g., K. Menninger, *The Crime of Punishment* (1966); B. Bagdikian, *The Shame of the Prisons* (1972); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676 (D.Mass. 1971), aff'd, 494 F.2d 1196 (1st Cir.), cert. denied *sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974); *Rhem* v. *Malcolm*, 371 F.Supp. 594 (S.D. N.Y.), aff'd, 507 F.2d 333 (2d Cir. 1974).

visions of the building rather than requiring or permitting aggregations of the population for such activities as meals and recreation. The modular unit, as its creator imagined it, would facilitate useful classifications of inmates (e.g., sentenced people, those awaiting trial, dangerous/nondangerous). Each functional unit, being self-contained, would include its own common area, eating place, some recreational facilities, and separate sleeping quarters. Since the total number within the unit would be relatively small, problems of mass traffic would be cut or eliminated. Long periods of lock-in time would become unnecessary. Inmates could circulate within the unit during much of the day, moving freely from the common area to the comparative privacy of a dormitory or the more nearly entire privacy of the single room, which was to be the most prevalent form of sleeping accommodation.

This design was implemented. As the MCC came to be constructed, almost every floor housing inmates has two modular units.[3] Each unit has from two to six "clusters" or corridors of rooms or dormitories radiating from a central common area. One of the units contains dormitories, designed by the planners to house ten inmates each. The remaining units con-

[3] The two exceptions are an honor unit, the only one on the second floor, and Unit 3, on the third floor. The honor unit houses the "cadre," sentenced inmates serving their terms at the MCC, who work throughout the institution and are rarely locked into their rooms. These inmates are housed in rooms originally intended as part of the infirmary. Unit 3 is the protective custody unit.



tain clusters of rooms, each designed for a single occupant, each originally equipped with its own key to be given to the inmate.[4] Except for a unit now housing female inmates, each of the rooms has a washbasin and toilet.

The common areas are carpeted, and other details are designed to supply some color and interest for the eye. These areas, except for the one in the protective custody unit, are two stories in height, with flights of stairs leading to the rooms or dormitories. Each common area has a color television set, couches, chairs, tables, telephones, mail boxes, exercise apparatus, one or more typewriters, laundry facilities, a water fountain, an education area, and pantries with microwave ovens. There is equipment for closed-circuit educational TV, said at the time of the court's last visit to be verging toward employment. There are staff offices within the units (other than the protective custody unit). Carrying out the functional design, meals are brought on carts to the units, having been pre-cooked and apportioned onto trays, and reheated in the microwave oven before being served and consumed within the unit.

[4] The word "design" is—or is readily capable of being made—ambiguous. As used herein, it means "intended" by the planners of the structure, not merely as an abstract idea, but in terms of concrete effectuation (and, often, public assurances to other agencies or branches of government). Thus, a room planned for single occupancy was built (and equipped) with a single bed, storage and movement space suitable for one, lighting and ventilating equipment similarly arranged, etc. See 428 F.Supp. at 335-340, where the conversion of these single rooms to doubles was held by this court to have been unlawful.

Avoiding the bar or cage motif, the designers and builders of the MCC arranged narrow, but unbarred, windows facing the outside world, made of a powerful ⅜-inch thick unbreakable polycarbonate plastic, which is colorless and transparent.[5] The windows are recessed some 14 inches from the building's face and are soundproof.

Since the units are designed and used to accommodate nearly all the regular aspects of life in confinement, there is little or no reason in respondents' view, or opportunity, for an inmate's departure from the confines of the unit during the days and nights of his or her stay. Many inmates actually stay within their units continuously for long stretches of days or weeks. There is no gymnasium, chapel, commissary, or industrial work place. There is a rooftop recreation area equipped with an abbreviated basketball court, and for paddleball, handball, or open-air spectatorship. The area is surrounded by a wall 20 feet high and topped by a mesh of stainless steel wires welded to a steel gridwork. The inmates, proceeding by units, are allowed about an hour a day in this rooftop area, the desirability of which varies, of course, with weather conditions, and they vary widely in their uses of the opportunity. For the overwhelming majority of inmates, these excursions, the sick call, attorney visits, and court appearances are the only times they leave their units.

---

[5] As a result of an escape attempt, bars have been placed on some of the windows, and steel sheathing has been placed on the inside of certain rooms with exterior walls.



Other aspects of the functional-unit plan—touching, *inter alia*, visiting, religious activities, and library facilities—are best discussed in connection with specific issues to be decided.

## II.

General propositions may not decide, but they define some useful perimeters for, concrete issues like those the petitioners have raised. In any case, the court has found it convenient to take some rough bearings before proceeding to the asserted grievances one by one.

We work in a new, but already substantial, field of law elaborated mostly by federal courts responding to demands of *state* prisoners for rights under the Federal Constitution and federal laws said to be offended by their treatment in state prisons. A host of cases have marked by now an array of rights to minimal decency in jails and prisons—some rights of expression and religious observance; rights to moderately civilized living quarters, food, and medical care; rights to escape punishment either barbaric in character or arbitrarily imposed; rights even to a measure of privacy and personal integrity, among others. Without exhausting them here, the federal charter of prisoners rights has featured prominently the First, Eighth, and Fourteenth Amendments, commonly marshalled against state defendants under the aegis of 42 U.S.C. § 1983.

There is little if any quarrel in the scholarly briefs before us that the federal rights given to state prisoners are not greater than those of federal pri-

soners. A question still surprisingly open is whether a federal court, confronted by demands for fair treatment with "its own" inmates, may not in such a case shoulder greater responsibilities or, to put it less demurely, exercise greater powers. We send them there, after all. Bernard Shaw was probably right for his time when he said:

> "Judges spend their lives in consigning their fellow creatures to prison; and when some whisper reaches them that prisons are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable; which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion."[6]

But that is no longer the position when state prisoners come to federal court. It may outrun precedent to say prisoners are "wards of the court."[7] Still, the notion that the judges may ignore people after they are confined is no longer valid.[8] And it may be uniquely un-

---

[6] "The Crime of Imprisonment," preface to S.&B. Webb, *English Prisons under Local Government* (1922), quoted in Note, *Beyond the Ken of the Courts*, 72 Yale L.J. 506, 558 (1963).

[7] See Singer, *Prisoners as Wards of the Courts—A Nonconstitutional Path to Assure Correctional Reform by the Courts*, 41 U.Cinn.L.Rev. 769 (1972).

[8] This may be one of several subjects on which we could learn from foreign counterparts. Judges in France, West Germany, and Italy, perhaps elsewhere, are charged with supervision over conditions of confinement, claims of maltreatment, aspects of parole, and related matters of penal administration.



acceptable for federal judges dealing with federal prisoners after all that has happened lately to state prisons in the federal courts. As the point has been put negatively, "where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Procunier* v. *Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974). It is at least implicit that our duties are less constricted with respect to federal prisoners.

Beyond such general propositions, there are pointed and specific reasons justifying closer scrutiny of federal prison conditions by federal judges. Without reaching questions of constitutional law, we find in the statute books a matrix of federal law in which our Bureau of Prisons functions. These statutes extend comprehensive *powers* of management, control, and supervision over federal prisons and prisoners, see 18 U.S.C. §§ 4001(b), 4042, 4081, and 4082, and the powers are given to administrative officials, not judges. At the same time, by no means uniquely, the powers import *duties*, see 18 U.S.C. §§ 4042 and 4081, and these obligations (to take care, protect, classify, provide suitable quarters, and instruct) are not misconceived or distorted if we describe them as intended to "benefit" those locked up under federal authority. It is no long step from that to infer that some rights —at least against arbitrary, capricious, or unauthorized treatment—accrue to the prisoners for whose management the statutes were written. Cf. *J. I. Case*

v. *Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964).

Further grounds for thinking the federal judicial power (and responsibility) broader for federal than state prisons may be found in the Administrative Procedure Act. When state officials, judicial or other, chafe against federal intrusions, their own provisions for reviewing administrative action offer wide avenues for recapturing leadership and control in their own domains.[9] It was never decreed, after all, that the bare floor of federal constitutional prohibitions must become for the States a ceiling above which humane and creative ordering, even for prisoners, should not be conceived.[10]

By a parity of reasoning, the *statutory* powers of the federal courts to draw lines against arbitrariness, caprice, and irrationality would seem to be available in appropriate cases where actions or practices of the Bureau of Prisons are called into question.[11] The subject seems still to be surprisingly open. There is some spare and divergent authority on the applicability of the APA to the Bureau of Prisons. Compare *Ramer* v. *Saxbe*, 173 U.SApp.D.C. 83, 85, 522 F.2d 695, 697 (1975), with *Clardy* v. *Levi*, 545 F.2d 1241 (9th Cir. 1976); see also *Mercer* v. *United*

---

[9] See Comment, *A Statutory Right to Treatment for Prisoners*, 50 Nebraska L.Rev. 543 (1971).

[10] Cf. Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms*, 4 Vanderbilt L.Rev. 620 (1951).

[11] Cf. Spaeth, *The Court's Responsibility for Prison Reform*, 16 Villanova L.Rev. 1031, 1041-46 (1971).



*States Medical Center for Federal Prisoners*, 312 F.Supp. 1077, 1079-80 (W.D.Mo. 1970). Some courts have reviewed actions of prison officials under an "arbitrary and capricious" or "abuse of discretion" standard without specifically indicating the derivation of the standard. See, e.g., *Marchesani* v. *McCune*, 531 F.2d 459, 462 (10th Cir.), cert. denied, 429 U.S. 846, 97 S.Ct. 127, 50 L.Ed.2d 117 (1976); *Royal* v. *Clark*, 447 F.2d 501, 502 (5th Cir. 1971). Without presuming to synthesize definitively the wisps of uncertain doctrine, and without considering "applicability" as a universal concept (since the APA may, of course, apply in some respects and not in others), but having firmly in mind the basic premise that "judicial review * * * will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967), this court has concluded that at least some actions of the Bureau of Prisons are neither "committed to agency discretion" nor shielded by any "statutes [which] preclude judicial review," 5 U.S.C. § 701, so that there is some scope for judicial duty and authority under the APA.

On the latter aspect, little need be said. There simply is no statute precluding judicial review.

The prior criterion—whether the subject is "committed to agency discretion"—is a harder topic. It was customary until lately for the judges to stay strictly away from issues as to prison administration. See *Procunier* v. *Martinez*, 416 U.S. 396, 404, 94

S.Ct. 1800, 40 L.Ed.2d 224 (1974). That stance has changed radically in the last decade or so. It remains true that the judges are not to take over the running of the prisons, being notably "ill equipped" as well as unauthorized to do that. Id. at 405, 94 S.Ct. 1800; and see *Meachum* v. *Fano*, 427 U.S. 215, 228-229, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Still, the notion of prison administrators as absolute sovereigns is quite dead. And that is as it should be. There are powerful reasons, after all, why the judges ought to be prepared to give at least some attention to complaints against the conditions of confinement ordered by judges. There is commonly as a practical matter no other forum in which prisoners can be heard. They have no clout with legislators, other elected officials, or anyone in the responsible agency. See *Davis Associates* v. *Sec. of HUD*, 498 F.2d 385, 390 (1st Cir. 1974). Despite the traditional reverence we have paid to the expertise of jail keepers, there are, as the present record reveals, many pertinent matters on which their knowledge seems no more profound than that of judges. And experience has taught us now that judicial intervention may be meaningful, effective, and beneficial, without also being unnecessarily intrusive. There are, in sum, at least several factors of consequence rendering it unacceptable to hold across the board that prison officials' actions, policies, and procedures are unreviewably committed to their discretion.[12]

---

[12] See generally, Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv.L. Rev. 367 (1968).



Whatever may come to be the scope of statutory review of actions by prison officials, there are clear grounds of familiar judicial policy favoring that mode over constitutional adjudications. To be sure, this is an area, like may others, where conceptions of due process are "not graven in stone." *Wolff* v. *McDonnell*, 418 U.S. 539, 572, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Times and circumstances change; "a reasonable accommodation" at some point in constitutional terms may come at some later time to be unreasonable and unacceptable. Id. So there is flexibility in any event. But that desired quality and maximum participation by all those charged with governing, is more readily achieved when sound judicial decisions are possible without resort to the Constitution. Legislative and executive responses—especially on matters like prisons, where the primary authority and concern are indeed for legislative and executive officials, *Procunier* v. *Martinez*, *supra*, 416 U.S. at 404-405, 94 S.Ct. 1800; see also *Meachum* v. *Fano*, *supra*, 427 U.S. at 2288-29, 96 S.Ct. 2532—are more easily given, and may be paid more entire deference, when the adjustments and balancing of interests are accomplished in terms less portentous that the Constitution's. Upon premises such as these, this court has undertaken, with respect to each of the several issues, to consider possible non-constitutional grounds as well as (in fact, prior to) the constitutional theories mainly debated in the briefs.

It may be, of course, that the difference becomes more subtle and refined than is useful. What is "ar-

bitrary," "capricious," "irrational," or "unreasonable," may at once, and indistinguishably, violate constitutional as well as statutory rights.[13] It may be enough for most purposes, without too much refinement, to accept as a usual test the Government's shortly stated standard of "whether the institution is providing reasonable and decent conditions of confinement * * *."[14] We are commissioned, however, to be explicit and candid, and to conform to the law. The effort has been, therefore, to identify the grounds of decision with a measure of specificity.

Whatever the grounds, whether constitutional or statutory, the case has been approached with three basic principles in view. These bear restatement:

*First*, deference is owed to the primary authority and expertise of those charged with building and running the prisons. Their judgments, unless made arbitrarily or in conflict with particular rights given by Constitution or statute, are entitled to respect and probable finality. See, e.g., *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, —— U.S. ——, ——, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977).

*Second*, it remains nevertheless a powerful principle that a prisoner retains "all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation

---

[13] But see Linde, *Due Process in Lawmaking*, 55 Nebraska L.Rev. 197, 225-235 (1976).

[14] Respondents' Post-Trial Memorandum 56.



and that of other prisoners, it does not deny his right to personal security against unlawful invasions." *Coffin* v. *Reichard*, 143 F.2d 443, 445 (6th Cir. 1944). Defining the rights thus retained—and balancing them against problems of security, good order, and the supposed purposes of punishment—is now an accepted, if not uniformly simple, task of the judiciary.

*Third*, pre-trial detainees, a central group in the petitioner class, are not subject to the substantial powers of prison officials that attend their function of administering punishment. For these detainees, presumed to be innocent and held only to ensure their presence at trial, "any deprivation or restriction of * * * rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity." *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975); see also *Rhem* v. *Malcolm*, 507 F.2d 333, 336-37 (2d Cir. 1974).

With these thoughts in view, we proceed to the list of issues and their determination.

## III.

### A. MODULAR CONFINEMENT

As described earlier, the MCC is organized into self-contained living units. With the exception of medical services and recreation on the rooftop area, the institution provides all services to the inmates on the living unit.

This "modular unit" is an interesting, well-intended, in some ways beneficial, but in some ways uniquely restrictive and hotly contested mode of confinement. The combination of common areas with radiating clusters of sleeping quarters is at first—and, indeed, steadily—more pleasing to the eye than the traditional corridors of cell blocks or dormitories. On the other hand, the narrow perimeter measurements of the unit as a whole soon become oppressive and close when, as is usually the case, they bound the inmate's world for 23 or 24 hours of the day. There is no room to run or jog or even walk very much. There is no place to go outside the unit—or, at least, no place where it is permissible to go.

In this important respect, the units contrast sharply with more familiar styles of prison architecture. In many other jails, and in many secure prison facilities for sentenced inmates, the people in confinement can move freely over relatively long distances and in relatively large spaces. Within the perimeter walls of a Danbury or a Lewisburg for example, there are hundreds of yards of walking and running distance both in recreational areas and in the corridors or open spaces leading from one to another of the places to which prisoners are expected and permitted to go. Movements of this nature are more or less random within the prescribed time spans, so that there is a modest but noticeable measure of choice and autonomy. During designated periods, confined people may proceed to work places, dining halls, commissaries, libraries, auditoriums, chapels, school rooms, gym-



nasiums, playing fields, and other varied destinations. Many of these goings and comings are matters of individual choice. They may be accomplished individually or in random, self-selected groups rather than formations proceeding under guard.

Analyzing the far more straitened confines of the MCC, experts for petitioners condemned it as a harsh and unacceptable form of "maximum security" imprisonment. Respondents' experts, who described as "maximum security" institutions those where inmates are locked into their rooms for 23 hours a day, or where inmates are separated from the guards by bars, considered MCC to be "medium custody." There is no dispute, however, that movement is more restricted at the MCC than in most other federal facilities. Nor are we likely to proceed far in resolving specific issues by conjuring with categories like "maximum" and "medium."

A corollary of the modular living system is the lack of central facilities which inmates may visit to engage in certain activities—an indoor gymnasium, chapel, law library, general library, or commissary. Also, keeping inmates confined to their living units restricts employment and educational program opportunities. Petitioners request that the court order sweeping changes in the modular living system, including directions to develop central facilities such as those listed.

In studying the several issues thus raised, the court has confronted two that have pervasive significance:

the classification of inmates and the length of time people are confined at the MCC. Because their resolution affects a train of other matters, these problems are treated first, followed by others more or less in the order of the briefs.

1. *Classification.*—A relatively small number of MCC inmates are free of the most restrictive aspects of modular confinement. These are cadre personnel, often called "redstripers" for an identification symbol they wear, who are free to pass through the doors separating units and move about through the areas within the outside perimeter of the Center. For most of the others, however, the situation of substantially total confinement is maintained without any attempted distinctions among the obvious categories into which the inmates fall. This virtually complete failure to classify is defended on the ground that people stay for only brief periods in the MCC and that effective determinations as to their characteristics are thus rendered difficult or impossible. Further, respondents point out, they do not have pre-sentence reports on pre-trial detainees and thus lack a ready source of information on which to base classifications. It may be as difficult as respondents say to classify MCC inmates, though this is not established to the court's satisfaction. The claim of impossibility is totally untenable.

The failure to distinguish among inmates leads to a grossly excessive use of substantially total confinement when some lesser level of restriction would be entirely feasible in a great many cases. *Rhem* v.



*Malcolm*, 507 F.2d 333, 338 (2d Cir. 1974), aff'g 371 F.Supp. 594 (S.D.N.Y. 1974). While the court has been asked to order sweeping changes in the physical arrangements for modular confinement, it seems imprudent to go so far. Instead, the court will direct a reasonable system of classification, allowing the respondents themselves, in the exercise of their main responsibilities, to proceed from that to a more acceptable level of confinement for at least a large number of those held in the MCC.

There is no rational excuse for holding elderly, lame, sickly, and otherwise incapacitated persons as tightly as may seem necessary for those more agile and disposed to take measures. Similarly, it is unacceptable to lump without discrimination the embezzler, the bank robber, the mail thief, the narcotics dealer, and every miscellaneous category of alleged criminal, and treat all alike for purposes of security. Not least of all, it is impermissible to treat indistinguishably those who are presumably innocent and awaiting trial, and those who have been convicted and are serving sentences.

The failure to classify, with its consequences of excessive and indiscriminate confinement, is rationally unsupportable, and correctable for that reason alone. It is also, as the cases show, a denial of due process. Building upon the common sense of the situation, as vindicated by ample precedents and nowhere refuted by respondents' submissions, the court will order, first, that respondents must separate pretrial

detainees from sentenced inmates. *Barnes* v. *Gov't of the Virgin Islands*, 415 F.Supp. 1218, 1235 (D.V.I. 1976); *Holland* v. *Donelan*, Civil Action No. 71-1442 (E.D.La. 1973); *Hamilton* v. *Landrieu*, 351 F.Supp. 549, 552 (E.D.La. 1972); *Taylor* v. *Sterrett*, 344 F. Supp. 411, 423 (N.D.Tex. 1972), aff'd in part, rev'd in part, 499 F.2d 367 (5th Cir. 1974), cert. denied, 420 U.S. 983, 95 S.Ct. 1414, 43 L.Ed.2d 665, reh. denied, 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975); *Brenneman* v. *Madigan*, 343 F.Supp. 128, 138-140 (N.D.Cal. 1972); *Hamilton* v. *Love*, 328 F. Supp. 1182, 1191 (E.D.Ark. 1971); *Jones* v. *Wittenberg*, 330 F.Supp. 707, 717 (N.D.Ohio 1971), aff'd *sub. nom. Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972).

Secondly, respondents must separately classify persons who pose physical dangers, who are thought on plausible grounds to pose risks of violence, of escape, or attempts to escape. *Rhem* v. *Malcolm*, 371 F.Supp. 594, 624-25 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974). See also *Obadele* v. *McAdory*, Civ. No. 72J-103 (N) (S.D.Miss. June 19, 1973); *Taylor* v. *Sterrett*, *supra*, 344 F.Supp. at 423; *Brenneman* v. *Madigan*, *supra*, 343 F.Supp. at 140. This is not only appropriate for the general security of the institution; it is also a means of implementing the rights of the inmates themselves to be protected from physical and mental injury. *Gates* v. *Collier*, 501 F.2d 1291, 1308-09 (5th Cir. 1974); *Martinez Rodriguez* v. *Jimenez*, 409 F.Supp. 582, 594 (D.P.R. 1976), aff'd,



551 F.2d 877 (1st Cir. 1977); *Pugh* v. *Locke*, 406 F. Supp. 318, 329, 333 (M.D.Ala. 1976); *Alberti* v. *Sheriff of Harris County Texas*, 406 F.Supp. 649, 669 (S.D.Tex. 1975); *Rhem* v. *Malcolm*, *supra*, 371 F.Supp. at 628-29; *Incarcerated Men of Allen County* v. *Fair*, Civil No. C 72-188 (N.D.Ohio, May 19, 1973). As the court said in the last of these cases:

> "[A] jail should be a very safe place to be. Prisoners have a right to safety, and failure to provide maximum possible safety because of administrative or mechanical problems cannot be justified." Opinion at 3.

It is unacceptable, for example, to house in dormitories inmates who, on reasonable grounds, must be deemed to present threats to those with whom they live.[15]

When the foregoing measures of classification have been instituted, perhaps along with others that respondents are, of course, free to evolve, it should be feasible to relax the existing restrictions on movement within the outer borders (which are highly secure) of the MCC. As has been noted, the court is unable and unwilling to prescribe such further measures of relief at this time. It is to be hoped that respondents will deal creatively and sufficiently with the problem.

---

[15] Petitioners demand that they be placed in dormitories only with their consent. In view of the ruling now on classification and the determination below as to length of stay, the court denies this further form of proposed relief. There is no need to decide whether a total prohibition against dormitory living might in some circumstances be required.

The issues that may yet arise on this score are postponed for another day.

2. *Length of confinement.*—It has become clear—it could perhaps have been said *a priori*—that disputed conditions which may be reasonably tolerable for relatively short terms become progressively more cruel or injurious with the lapse of time. The point is underscored by respondents. Throughout their arguments—on exercise, recreation, work, and other aspects of MCC life—they emphasize that this is a short-term institution. The argument is significant. And it has significant implications.

Respondents stress that over 50% of the inmates spend less than 30 days in the MCC and 73% less than 60 days. Petitioners stress the still substantial number comprising the other 25%. Since the law values each of us one at a time, this large group of human beings must be reckoned with. So it is important to deal with the evidence that 7.5% are confined in the MCC for 60-90 days; 4.5% for three to four months; 8% for four to six months; and so on, with some inmates, mostly those in protective custody, residing at MCC for as long as 620 days.[16]

The total record on the pertinent subjects demonstrates in the end that the modular arrangements in

[16] These figures (rounded off) are taken from a survey done by respondents. Petitioners argue that it underrepresents the number of inmates who stay for long periods of time. Petitioners would also add successive sojourns at the MCC to determine an inmate's length of stay. In view of the court's ruling, it is unnecessary to resolve the argument in precise detail.



the MCC will do on the whole for as long as 60 days, but not for longer. This is obviously not a figure computed with calipers. It is, however, a considered judgment based on the totality of the relevant circumstances—such things as the lack of a gymnasium, the lack of outdoor space for walking and running, the absence of a chapel, auditorium, library, separate work places, separate school and classrooms, and other facilities. Appraising these aspects in light of the testimony and direct observation, the court has been led to conclude that the MCC grows unacceptably cramped and oppressive for most healthy adults after a sojourn of two months. Some, of course, may find it tolerable, even preferable, for longer. Some may suffer—to an extent that may come later to be separately adjudicated—after much shorter times. But the record is preponderantly supportive of the view that the majority of inmates may fairly be subjected to the modular arrangement for 60 days, and that they are likely thereafter to suffer unduly in terms of close, constricting, tense, and frustrating confinement. See *Rhem* v. *Malcolm*, 432 F.Supp. 769, 789 (S.D.N.Y. 1977), and cases there cited.

Upon these findings, and having in mind the purpose and stated rationale of the Center and its design, the court concludes that confinement for over 60 days, except for volunteers, should not be tolerated. It is an arbitrary and capricious deviation from the intended and promised use of the facility. It is, if the point need be reached, a denial of due process. There

is no reasonable or rational basis for perverting a facility built and justified for brief periods of detention into a long-term prison. The court will, therefore, order that no inmate be kept in the MCC for a period longer than 60 days without his or her consent. As soon as it is known that an inmate's stay will exceed 60 days (a prospect that may be obvious from the outset or only become obvious after the passage of some time), that inmate will be informed of his or her right to be transferred to another institution. The right may be waived. Inmates may well prefer the MCC, for its proximity to home or other advantages, despite its defects. See *Rhem* v. *Malcolm*, *supra*, 432 F.Supp. at 789. But the right of transfer, along with the privilege of waiver, must be made known promptly in clear and non-coercive terms.

As will appear further, several of the rulings on other issues rest in part on this premise of relatively short stays in the MCC.

3. *Physical Exercise.*—There is no indoor gymnasium at the MCC. Physical exercise is available one hour each day on the rooftop area, weather permitting. There are weight machines, exercise bicycles, dip bars, jogging machines, wall pulleys, and medicine balls variously available in the multipurpose areas of the units, though not all of these things are on all units.

Petitioners challenge respondents' assertion that inmates have access to the rooftop daily. They point to the vagaries of weather in New York City. They



complain further that the hours assigned to each unit frequently coincide with that unit's visting hours; that the elevator is at times inadequate to transport expeditiously all inmates who wish to use the roof; that the guards do not make enough of an effort to let inmates know when the roof is open. Finally, petitioners point out that on several occasions over the past year, roof usage has been cancelled because of staff shortages.

The court finds, however, that the rooftop area is effectively available to the inmates for one hour per day at almost all times when the weather leaves it usable. The assigned hours are posted, and inmates can arrange to be ready for the assigned periods. Coordination with visits is perfectly feasible; respondents must deal, like everyone, with the limits of the day. On our tours, the roof area was well populated by inmates engaged in a variety of activities.

For those days when the weather does not permit outdoor activity, there is sufficient apparatus on the units to provide exercise. Although the use of this equipment sometimes results in noise that is less than ideal for TV listeners, the annoyance is modest and manageable with minimal effort by the inmates themselves to accommodate each other's needs.

A gymnasium, originally part of the MCC design, would be highly desirable. If the court were permitting involuntary sojourns of over 60 days, some facility of that nature might be claimed more effectively to be a requirement enforceable under the

Constitution or relevant statutes. But the enforcement of the original purpose to use the MCC only for short terms obviates that possibility. The court concludes that the provisions for physical exercise, in the setting of this decision as a whole, are sufficient.

4. *Religious activities and observances.*—The MCC provides religious services for Catholics, Protestants, Jews, Muslims, and Christian Scientists. There is, however, no central chapel. Religious services are led by clergy of the various faiths who make the rounds of the institution. Because the inmates may not leave their units, the clergy must divide their time among them and are unable to provide very extensive services or counseling. Several of them have offices in the MCC, but the inmates are not allowed to leave their units to visit them.

The modular restrictions result in a series of complaints. Jewish inmates, scattered among the units, are often unable to assemble a *minyan* (ten adult males) required for organized worship. A Muslim inmate complained that he did not participate in services because the Imam was of a sect different from his. Protestant and Catholic inmates protested the brevity of the time their clergymen have for them. More broadly, petitioners urge that respondents be required to "provide an adequately equipped chapel at the MCC to which petitioners may go for religious services;" additionally, that inmates should be allowed to visit the clergymen's offices; and that respondents should provide "sufficient numbers of adequate and



qualified clergy of the same major faiths as petitioners."

It is obvious that conditions for religious observance at the MCC are not ideal. It would be preferable were there a chapel or other arrangements for inmates of the same faith to congregate. It is to be hoped, moreover, when classification procedures begin and overcrowding is mitigated, that respondents will find it workable to allow assembly of people from the various units for more effective and less cursory services. But whether or not that hope is realized, the court finds no grounds for ordering any of the relief thus far discussed under this heading. Again, for the short terms hereafter to be the rule, the deprivations must be tolerated, as they are in other exigencies both civilian and military, on land and at sea, that occur and recur in our community's modes of existence.

In one respect, however, respondents are shown to be paying less respect than the Constitution commands to the religious needs of MCC inmates. Muslim observers, like religious Jews, must eschew pork. Jewish inmates obedient to this requirement are given kosher meals since our Circuit ordered support of this dietary restriction. *Kahane* v. *Carlson*, 527 F.2d 492 (2d Cir. 1975). The simplest, if not a compulsory, expedient would be to give the same meals to observant Muslims. Instead, respondents have profesesd to prefer to the latter an arrangement in which pork is deleted from the Muslim meal tray and an extra helping of potatoes or some other vege-

table is substituted. The arrangement is a failure. The substitution is wrong in nutritional principle; it fails to supply comparable nourishment. Moreover, even this inadequate arrangement is often neglected, and the observant Muslim is made simply to do without the meat portion or any replacement of any kind.

In this setting, the discrimination between Muslims and Jews, certainly not sought by either group, becomes a wrong to be remedied. Respondents have suggested no reason whatever for allowing it to continue. "In a case where a [practice] has been opposed on grounds as substantial as those presented here, the [agency] has the burden of offering *some* reasoned explanation." *Assoc. Indus. of N.Y.S., Inc.* v. *United States Dept. of Labor*, 487 F.2d 342, 354 (2d Cir. 1973). Respondents make no pretense of meeting this minimal test.

The court will order, therefore, that observant Muslims be served pork-free meals the same as those given to observant Jews, or allowed in substantially identical fashion to satisfy both their nutritional and their religious entitlements. The court leaves open to this extent the exact mode of compliance. See *Kahane* v. *Carlson*, *supra*, at 496. The critical point of the decree is that the rights be respected and that the existing course of arbitrary and unjustified discrimination be ended.

5. *Law Library.*—The MCC maintains a law library that functions primarily as a lending library. Only members of the cadre are permitted to visit the library. All other inmates must request books as



they need them, giving specific citations. Request slips are placed in envelopes on bulletin boards of each unit. The slips are picked up daily, Monday through Friday, and, within a day or two, the books are sent to the inmates. Three books may be requested at a time; they may be retained for a maximum of three days, but the time limit is often relaxed.

The librarian, a disbarred attorney serving a sentence at the time of our trial, is prohibited from engaging in any research. While this restriction is sometimes disregarded, the librarian never functions effectively as a legal researcher on more than trivial questions.

A list of library materials and rules is provided to inmates. The list was found, however, to be seriously incomplete. A considerable amount of material actually in the library is not on the list, an omission that is specifically hurtful in an arrangement that denies library users access to the shelves and the physical collections. This lack of access is the most serious and decisive respect in which the library facility must be deemed inadequate. Writing for the small and selected readership of the Federal Supplement, the court need not labor the point that effective legal research is impossible where it must be attempted at a remote distance from the volumes, with hopeful stabs at three books at a time spaced over intervals of two days or so. While petitioners also complain of other things, including the sufficiency of the collection, this problem of non-access presents

an overriding concern in the circumstances of the case before us.

Drawing a long bow, as always, petitioners demand that there be "a fully equipped up-to-date law library" with access at all times other than hours of lock-in. They contend also that the prohibition against possession of personal typewriters impairs efforts at self-representation; that the institution must provide typewriters for those who need but do not have them; and that facilities for duplicating papers are not, but should be, available to them.

The basic propositions from which the course of decision may proceed are these:

> *First*, all of the inmates must have "adequate, effective, and meaningful" means of access to the courts. *Bounds* v. *Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).
>
> *Second*, all of them, if they are so minded, may represent themselves. *Faretta* v. *California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Price* v. *Johnston*, 334 U.S. 266, 284-85, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948); *Adams* v. *U.S. ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L. Ed. 268 (1942).

When we apply these principles to the case at hand, it becomes evident that a number far smaller than the total MCC population is meaningfully affected by the library issue. The inmates awaiting trial, the primary class for which the facility was built, are overwhelmingly represented by counsel. For them, the complaints about the library are not significant.



Most prisoners here on writs and most of those serving the characteristically short sentences involved when the MCC is made the place of confinement are not engaged in *pro se* litigation.

Finally, the problem for all should be alleviated by the limitation to 60 days of most sojourns at the MCC. There remains, nevertheless, the small number exercising their right to represent themselves. For these, as has been noted, the existing long-distance, slow-moving, lending library system now in effect must be replaced. Contrary to respondents' contentions, this conclusion has support in precedent as well as in realities familiar to our profession. E.g., *Nadeau* v. *Helgemoe*, 423 F.Supp. 1250, 1272-73 (D.N. H. 1976); *Kirby* v. *Blackledge*, 530 F.2d 583, 586 (4th Cir. 1976). Inmates entitled to a library facility have a right to physical access to the shelves during a reasonable period of each day.

The implementation of this right should appropriately be left in the first instance for discretionary selection among possible options by the prison authorities. The highrise urban institution presents both opportunities and difficulties. The MCC is a short walk or ride from some of the most ample law libraries in the country. The building itself, including the existing law library, seems cramped for work space as well as book shelves. If meaningful research is to be done there, the MCC library will need more room and a more ample collection of books than it now possesses. Balancing the several problems of logistics and finance, respondents may conclude that transporting the relative few who genuinely need

this service makes more sense than contriving the expansions of the MCC library that would be necessary to meet minimum standards. Other possibilities exist: for example, respondents may wish to consider, in a City filled with eager law students, some arrangement under which inmates might be able (if they chose) to have the assistance of such students, volunteer lawyers, or others rather than enjoying the debatable right to wander freely, but perhaps blindly, among law library stacks. See *Stevenson* v. *Reed*, 391 F.Supp. 1375, 1379 (N.D.Miss. 1975), aff'd, 530 F.2d 1207 (5th Cir. 1976).

Within 90 days from the date of the decree herein respondents will report to the petitioners and the court their chosen mode of compliance with the court's direction that inmates with need therefore be given physical access for reasonable periods to adequate law library facilities. If respondents' determinations are disputed, counsel for petitioners will have 15 days in which to bring on objections and counter-proposals for the court's consideration. If respondents choose to comply by improving the MCC library itself, they must complete and expand its collection.[17] The open-

---

[17] There is a stipulation, with some evident inaccuracies, as to what the library now contains. Without reproducing that list, the court will require respondents' report of compliance to contain a re-checked and accurate account of what is now on hand plus volumes to be added. As to the latter, in addition to the books now in the library, the decree will require that the Federal 2d and Federal Supplement series be extended back to 1950; that missing volumes in the several series now



ended handling of this subject at this stage is meant as an invitation to collaborative and imaginative management by respondents themselves. The court will be receptive in this light to proposed elaborations or modifications within the broad terms of what is held to be compulsory under the law.

There remain questions concerning typing and duplicating needs for legal submissions to the courts. The institution supplies one typewriter for each unit; petitioners say this is not enough and that there must be "an adequate supply of typewriters on the housing floors for use by petitioners in the prepration of legal materials."[18] The vagueness of the demand reflects the lack of solid foundation for the claim. The provision of more typewriters would be desirable. Perhaps the Bureau will acquire them in some future budget. But there is no ground for ordering more by court decree. *Eisenstadt* v. *Britton*, 478 F.2d 855 (5th Cir. 1973); *Stubblefield* v. *Henderson*, 475 F.2d 25 (5th Cir. 1973).

On the other hand, respondents' prohibtion against inmates' acquisition or possession of their own typewriters is, on this record, arbitrary and capricious. As is true of other restrictions respondents have im-

---

stocked be replaced; that the Modern Federal Practice Digest be completed and the Federal Practice Digest Second be added. Petitioners would add, *inter alia*, various items of state law. In New York City, respondents should be able to satisfy this demand by including in their compliance proposals some lending arrangements with nearby libraries or some means of giving inmates access to those libraries.

[18] Petitioners' Post-Trial Memorandum 341.

posed upon personal possessions, this one is supported by no suggestion of sufficient or persuasive reasons. The Constitution may not confer a right to have a typewriter as an incident to the right of access to the courts. *Tarlton* v. *Henderson*, 467 F.2d 200 (5th Cir. 1972). But it is clear that a typewriter is a valuable implement for this purpose; that typed papers may leap more vividly than handwritten ones to the watery judicial eye; and that a barrier against this kind of support for cherished interests ought to have solid justification in reason and experience. Lacking any such support, respondents' prohibition against typewriters should and will be enjoined.

Finally, as to duplication of papers, the court finds petitioners' complaint unsupported by the evidence and dismisses this aspect of it.

6. *General Library.*—The MCC has a central lending library from which inmates may order books which are shown on a list available in each unit. Additionally, racks of paperback books are placed in each unit. The library is stocked primarily from donations. Every four to six weeks, the institution receives as donations from drug store book racks between 1500 and 4000 paperbacks that have been stripped of their covers, and these are divided among the units. Magazines are collected by the Education Coordinator from the Post Office's dead letter office and divided among the units.

Petitioners seek, but the court will not grant, an order requiring a central library to which they may have physical access, as is their position regarding



the law library. Since the court enjoined enforcement of respondents' "publishers only" rule, 428 F. Supp. at 340-41, inmates may receive reading matter from friends and relatives. There are magazines and books on each floor although, admittedly, they may not please all tastes. There is television on each unit. Newspapers are available from the commissary. One need not, and the court does not, find the MCC an agreeable place for an addicted reader in order to hold, as the court does, that respondents are not failing in their legal duties in this respect.

7. *Education.*—The educational programs available to the inmates include "GED" (General Educational Development—High School Equivalency Diploma), English as a second language, adult basic education, college courses through the Empire State College programs (including federal grants to cover inmates' tuition payments), and classes in art, dance, creative writing, human sexuality and family dynamics, life skills, world politics, sculpture, and drama. A closed circuit television system has been installed (it is not yet operational) which will allow inmates access to over 100 programs upon request.

Considering that the institution is but two years old, this is not an unimpressive catalogue. To be sure, school catalogues are not the most precisely reliable documents. And there are patent defects, including the fact that most classes are confined to single units, so that offerings are unavailable because of insufficient enrollment when there might be enough students were they drawn from the place as a whole. Once

more, the court notes a hope that a rethinking of movement restrictions may lead to amelioration. But whether or not that happens, petitioners' demands for expanded educational programs cannot be granted by the court. The difficulty of organizing a meaningful education program for a largely transient and extremely diverse population cannot be overestimated. All things considered, respondents are doing not merely an acceptable, but a commendable job in this respect.

8. *Jobs.*—Petitioners complain that there are not enough job opportunities available to inmates. There are no work-release programs; some inmates are employed in the institution either for low pay or none at all. The court is asked to order that respondents offer "constructive employment" to all inmates who wish it; that these inmates be paid at the federal minimum wage; that no inmates be required to work more than eight hours per day, five days per week; and that convicted prisoners be allowed to participate in work-release programs.

The court is not persuaded of any ground for interference in this area. Respondents appear to make genuine and earnest efforts to create employment opportunities. Inmates are employed in a variety of clerical and administrative tasks, though there are, of course, a limited number of these. Many work at jobs they would not have chosen in the outside world, such as kitchen and sanitation work, but this is to be borne in the nature of the case. The institution has just received authorization for a broom and brush factory, a "first" for a detention facility.



It remains a regrettable fact that jobs are not available for many of the inmates. But this is among those gravest of social ills that courts cannot cure. It is not utterly irrelevant that the case has proceeded during a time of severe unemployment all over the land, especially among minority groups disproportionately over-represented in jails and prisons. The MCC is located in a large urban center where there are far too few jobs even for those not in correctional facilities. See, e.g., "New York is Lowest in Youth Employment," *New York Times*, August 2, 1977, p. 30, col. 1. Respondents appear to be doing what they can. The court may not expect or order more.

9. *Commissary.*—Among the deprivations of the modular arrangement is the absence of a commissary, like those in many other penal institutions, where inmates may visit and shop for snacks, tobacco, and other things. An order form is distributed to inmates weekly, and orders are filled within the next day or so. Inmates are permitted to spend a total of $15.00 per week or up to $50.00 per month. Prices are set to cover the salaries of the commissary staff, and are subject to change without notice. There is no place to list a second choice on the order form; thus, if the inmate orders Brand A and it is out of stock, his order is returned with this advice, there being no means to have shown that Brand B, or even X, would have been preferred to nothing. When the

institution is being inventoried, no orders are taken.

Deposits to inmate commissary accounts are made by the institution pursuant to "authorization" forms signed by inmates, allowing the institution to endorse checks and money orders made out to inmates, and deposit them in the MCC's bank account. These forms appear, however, to have been executed in many cases at and for institutions other than the MCC. Money orders are credited to an inmate's account within one day; checks are cleared within 30 days. Five days each week, the institution accepts deposits during two specified hours directly at the institution.

Petitioners seek a variety of changes in these commissary arrangements:

(a) The establishment of a commissary they may visit every other day, or, alternatively, the acceptance of orders daily.
(b) A place for alternate choices on order forms.
(c) Cessation of the cashing of checks and money orders in the absence of specific consent to MCC's exercise of this authority.
(d) Speedier clearance of checks.
(e) Removal of the $50.00 limit.
(f) Sales at "cost."
(g) Extensions of the hours when deposits may be made in commissary accounts.

The court will grant, at least in part, the first four of these requests.

The opportunity to visit at a store is among the small material pleasures most sorely missed in the MCC. The testimony reflects this; the court could



know it judicially. Notwithstanding this, the court finds no constitutional or other basis upon which it could order the provision of this amenity. On the other hand, the niggardly allowance of orders once weekly, plus the cavalier neglect to allow even second choices on the order form, represents a level of indifference that satisfies legal as well as lay notions of arbitrariness and caprice. The practice respondents defend means that an inmate unlucky enough to arrive the day after commissary orders are taken goes two weeks without the snacks or toiletries or tobacco he would wish to buy. The denial of a place for second choices reflects, in a petty but galling fashion, the kind of indifference the Bureau of Prisons has striven with much success to avoid in other respects. See *Wright* v. *McMann*, 387 F.2d 519, 525-26 (2d Cir. 1967). The quality of this stance is reflected in a Post-Trial Memorandum, where respondents say (218f *):

> "Petitioners' suggestion that the ordering procedures provide for alternate selections is a good one, and respondents will endeavor to implement it at the MCC. There is, however, no basis for the contention that such an administrative reform is constitutionally required."

There is no suggestion in this observation, or elsewhere, why respondents propose only to "endeavor," with no clear confidence of success, to meet this minimum dictate of reasoned decency. Nor is there any sound reason why the MCC, unlike jails and prisons across the land, should allow orders only once weekly.

It takes less than the Constitution to require correction of this condition.

To remedy these aspects in which the MCC's practices must be condemned as arbitrary and capricious, the court will require that commissary orders be taken at least every other day and that the forms make provision for second choices. At least one court has been more liberal, requiring arrangements for daily commissary orders. *Miller* v. *Carson*, No. 74-382-Civ.-J-S (M.D.Fla., Jan. 31, 1975). It was thought that a Florida jail could and should manage that. Perhaps respondents will strive successfully toward the same goal. Perhaps if the Bureau of Prisons comes to be widely outdone in this and other respects, there will be no reasonable ground for sustaining the continued lag. For the time being, the provision now made seems suitably conservative and sufficient. As for the second choices, the enforcement of respondents' favorable inclination accords with a weighty judgment closer to home. *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 846 (S.D.N.Y. 1975) (Lasker, J.). The court will so order.

The practice of endorsing inmates' checks and money orders without their specific consent is not defensible, and must be ended. There was testimony by a number of petitioners that remittances of this nature were on many occasions expected by them but never credited to their accounts. There is not sufficient evidence of specific conversion or misappropriation, but the Center's practice invites and supports hostile suspicion. It is arbitrary and capricious and,



if there is need to add it, a taking of property without due process of law.

A related item of seeming neglect, neither explained in the record nor seemingly explicable, is the 30-day delay before a check is credited to an inmate's account. Whatever banking and postal troubles we may lately have seen, this is not allowable on any reasonable basis. The MCC will credit checks in not more than 15 days unless there is good cause, duly communicated, for doing otherwise.

The remaining complaints concerning the commissary must be rejected. The limit of $50.00 monthly is dubious. It will bear reexamination as prices continue to rise. But it is not beyond respondents' powers, especially as mitigated today by the determination that receipt of packages be allowed. (See *infra*.)

There is no legal basis for demanding commissary sales at cost.

Finally, it is plausible to demand that there be an expansion of the hours for deposits in commissary accounts. But the record contains no concrete evidence of hardship on this score. As problems arise, if they do, respondents should have primary authority to consider their extent and possible solutions.

## B. OVERCROWDING

In the architectural and logistical plans as they were finally fixed, the MCC was designed to house a maximum of 449 inmates. That "rated capacity" has been routinely and substantially exceeded throughout

the short history of the jail. Even before it opened, rooms designed for single occupancy were being fitted with double bunks to hold two inmates—an arrangement since discontinued by order of this court, 428 F.Supp. 333, 335-40 (1977). There remain problems of overcrowding postponed to the plenary trial. Petitioners complain against two conditions, the existence of which respondents do not dispute: (1) the housing of 20 inmates in dormitories designed for 10, and (2) the use of common areas for sleeping men on cots, or even on the floors. The court finds that petitioners should prevail on both of these contentions.

Preliminarily, there is much to be said, resting upon broad principle and specific precedent, for the proposition that confinement in numbers that exceed rated capacity is in itself impermissible. *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392, 398 (2d Cir. 1975); *Ambrose* v. *Malcolm*, 414 F.Supp. 485, 493-494 (S.D.N.Y. 1976); *Taylor* v. *Sterrett*, 344 F.Supp. 411, 423 (N.D.Tex. 1972), aff'd in part, rev'd in part, 499 F.2d 367 (5th Cir. 1974), cert. denied, 420 U.S. 983, 95 S.Ct. 1414, 43 L.Ed.2d 665, reh. denied, 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975); *Hamilton* v. *Schiro*, 338 F.Supp. 1016 (E.D.La. 1970), order entered *sub nom. Hamilton* v. *Landrieu*, 351 F.Supp. 549, 551 (E.D.La. 1972); *Miller* v. *Carson*, 401 F.Supp. 835, 899 (M.D.Fla. 1975); *Pugh* v. *Locke*, 406 F.Supp. 318, 322 (M.D.Ala. 1976), citing order entered jointly in *Pugh* and in *McCray* v. *Sullivan*, 399 F.Supp. 271 (S.D.Ala. 1975). When the respondents, or others



with roles of authority in the responsible agencies, designed the MCC, they knew and intended, in the apposite word of defendant Director Carlson, that the facilities to be built would not be "plush." So it is significant that they planned, and proclaimed the plan, that the MCC would house 449 inmates, not the much larger numbers they quickly contrived to bundle into the building. See *Hanly* v. *Mitchell*, 460 F.2d 640, 643 (2d Cir. 1972), cert. denied *sub nom. Hanly* v. *Kleindienst*, 409 U.S. 990, 93 S.Ct. 313, 34 L.Ed.2d 256 (1972); *Hanly* v. *Kleindienst*, 471 F.2d 823, 826 (2d Cir. 1972), cert. denied, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1974). It is not necessary to hold defendants' own plans and ratings against them with the force of invariable regulations. Cf. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Service* v. *Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *U. S. ex rel. Donham* v. *Resor*, 436 F.2d 751 (2d Cir. 1971); *Smith* v. *Resor*, 406 F.2d 141 (2d Cir. 1969); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969). It may be that deviations from rated capacities will in a proper case be justified. On the other hand, it will not do to argue, as respondents do, that their ratings may never be held binding lest the jailers proceed forthwith to abandon civilized estimates and publish only barbaric plans.[19] On that appraisal of executive

---

[19] Respondents' Memorandum 101-102:

"[E]nforcement of a 'rated capacity' rule as petitioners suggest can only discourage planners from experimenting or providing additional amenities in terms of the physical

probity, we could never have had the long line of cases, of which a few are cited just above, holding officials to their own voluntary regulations.

In this court's view, it is enough for this case to say that the rated capacity as given by the prison officials themselves is strong evidence of what the facility and its components should hold. Approaching the two specific problems in that light, the court has confronted (a) living conditions grossly short of minimal decency, and (b) no semblance of justification except the general defense that the facilities of the Bureau of Prisons are *in toto* insufficient to house all the people consigned to them. That sort of defense has been rejected over and over again in cases involving state prisons. *Rhem* v. *Malcolm*, 527 F.2d 1041, 1043-44 (2d Cir. 1975); *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392, 399 (2d Cir. 1975); *Rhem* v. *Malcolm*, 507 F.2d 333, 341 n.20 (2d Cir. 1974); *Gates* v. *Collier*, 501 F.2d 1291, 1319-1320 (5th Cir. 1974); *Jackson* v. *Bishop*, 404 F.2d 571, 580 (9th Cir. 1968); *Nadeau* v. *Helgemoe*, 423 F.Supp. 1250, 1264 (D.N.H. 1976);

---

environment and the amount of space as has been done at the MCC. To the contrary, it will encourage planners to moderate, and indeed, to gear their designs to providing only the absolute minimum amount of space (or initially rating their facilities at such a minimum) in order to establish the highest possible capacity for fear that in a future emergency situation of a rising population the courts would not permit an upward adjustment of capacity even within the limits of generally accepted square footage requirements. Such a development would be unfortunate, indeed."



*Hamilton* v. *Love*, 328 F.Supp. 1182, 1194 (E.D.Ark. 1971); *Holt* v. *Sarver*, 309 F.Supp. 362, 385 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971). It has become clear by now that the exuberant rate at which we jail people[20] exacts a price for humane accommodations unless we are to repeal or revise principles of decency lately evolved. It is also clear in this light that the defensive posture of respondents must be deemed infirm. We are told that all the Bureau of Prisons facilities together can house approximately 22,500 people whereas the higher total of 29,050 were, as of the time of trial, assigned for federal confinement. The court is driven to a narrowly dispositive answer and a relevant observation or two.

*First*, and perhaps decisively, the court may adjudicate only upon the case and the facility before it; whether or how other jails or prisons may be stretched to greater capacity is not directly or meaningfully presented. While the court is not free to ignore the total setting, it is neither equipped nor authorized to judge the Bureau of Prisons as a whole.

---

[20] See United Nations Document A/CONF.56/6, "The Treatment of Offenders, in Custody or in the Community, with Special Reference to the Implementation of the Standard Minimum Rules for the Treatment of Prisoners Adopted by the United Nations," Annex II (working paper prepared by the Secretariat for the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1975). The cited document reflects the leadership role of the United States in numbers of people incarcerated as a proportion of the population. See, also, *U.S. Prison Population Sets Another Record*, 3 Corrections Magazine 3 (March 1977).

We do not know—we are not told—how varying conditions and facilities elsewhere may be thought to serve lawfully in confining numbers greater than originally intended. This case concerns a particular facility designed largely for pre-trial detainees and for other purposes associated with an urban jail-type structure connected with busy urban courts. Generalities about a whole prison system, lumping everything together and serving up grand and unparticularized totals, cannot play a material part in decision of this concrete case.

*Second*, the standards the court may enforce are minima; they may not be ignored or avoided on claims of administrative burden or expense.

*Third*, even a court may know that the numbers now confined in federal prisons are comfortably within the capacities of the Nation to house in conditions of minimum decency. We have produced adequate housing for hundreds of thousands in short days or weeks when the urgencies of warfare required it. The richest country in the world, carrying the message of human rights around the world, is capable of finding decent living quarters for the 6550 excess of prisoners over the 22,500 for whom there are said to be existing facilities. All of us whose jobs have to do with incarcerating people—the lawmakers, the prison officials, and the judges—are in some measure collaborators. But we are all bound to our separate duties under the oath to support the Constitution and the laws. When, as here, a case is properly brought



to assail conditions of confinement, it cannot be a sufficient defense that circumstances variously conceded to be "undesirable" or "uncomfortable" or "unsatisfactory" or otherwise regrettable must be held sufficient because the money to improve them has not been appropriated.

Upon the broad premises thus stated, we turn to the specific issues relating to the dormitories and the use of common areas as sleeping quarters.

1. *The dormitories.*—The dormitories were each designed to house 10 men on single beds.[21] They have been refitted with double bunks, and are now holding double their intended number. This means there are 20 men in each dormitory, or a total of 120 on the unit rather than the 60 for which the unit was designed. The result is described by respondents as "unsatisfactory" but not unlawful. "Unsatisfactory" is a mild characterization. The situation within each dormitory is one of intolerable crowding, strain, and distortion of facilities, and an obvious potential for the tensions of stretched nerves. Similar consequences permeate the unit as a whole; common facilities designed for 60 men are jammed and rendered miserable when made to serve for 120. The doubling of dormitory occupancy is held, in sum, to descend below the constitutional minimum, both for detainees and

[21] Petitioners claim the number should be nine. They rely upon an early sketch, changed as the plans progressed. The evidence sustains the view of respondents that the matured plan contemplated 10.

for sentenced prisoners, including those in the MCC on writs.

The list of oppressions and discomforts from packing two men into each space meant for one is not short. The double bunks are crampingly close together; single beds similarly spaced would be tolerable, if by no means luxurious. The common furniture within each dormitory has become a clutter—roughly doubling the two tables and eight chairs originally planned—so that there is scarcely room to move about. The common toilet facility is grossly inadequate.[22] Privacy is, of course, nonexistent in a dormitory, but the wretchedness of forced company is intensified by the added crowding and noise of twice the number meant to be there.[23] The solace of reading

[22] Each dormitory has a common bathroom with two sinks, one urinal, one toilet bowl, and one shower. It has been suggested in our record that this might do for as many as 15 men. Accepting that stinting estimate, we might order the dormitories reduced to no more than 15 occupants if toilet facilities were the only problem. But the cumulation of difficulties from packing 120 men into facilities for 60, and the overall absence of any suggestion of a viable number in between, leads ultimately to a ruling for the original design, and not more.

[23] Petitioners have sought a determination that dormitories may not be employed at all, that each inmate must have a separate room unless he or she consents to dormitory living. While that is by no means an extravagant proposal, according as it does with standards widely supported, American Bar Association, *Tentative Draft of Standards Relating to the Legal Status of Prisoners* § 6.12(b) and Commentary, 14 Am.Crim.Law Rev. 559-61 (1977) (hereinafter "ABA Standards"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections § 2.5(1) (1973), the court



and writing is impaired for those who might use it; reading lights meant for 10 single beds are blocked for those in bottom bunks.

The increase from 60 to 120 spreads discomfort and deprivation throughout the common facilities of the unit. The common area as a whole, which is all the men have for recreation and eating outside the dormitories, has become unacceptably crowded and noisy. A kitchen designed to heat food for 60 people cannot perform adequately for 120. Exercise equipment and common furniture are overtaxed and impaired for everybody. Like the dormitories themselves, the common space is generally more constricted, noisier, and more unpleasant than its designers envisioned.[24]

is not persuaded that it may be ordered as a matter of either constitutional or statutory right. There is tension, to be sure, in shared sleeping quarters. There are some obvious dangers of assault and other injuries even if the record before us lacks specific illustrations. But the problems seem manageable enough to leave the choice within the judgment of respondents. Perhaps we shall evolve to the higher minimum petitioners urge. At the moment, we are too close to wars and barracks, and too aware of slum housing visible from this courthouse, to hold that dormitories are *per se* forbidden. Cf. R. Titmuss, *Essays on the 'Western State'* 85-87 (2d ed. 1963). The separate, narrower question of classifying inmates so that dangerous men are not placed in dormitories has been dealt with above.

[24] Again, the factors might not singly condemn the arrangement. The court has ruled, for example, that the noise level is not in itself beyond limits we might order. It remains higher and more unpleasant than it would be had the plans been followed, and it adds to the totality of factors leading to condemnation of respondents' departure.

The visiting room, subject of other, separate complaints, has a special quality of bedlam in the dormitory unit. Planned for visitors who might be expected by 60 inmates, that room is not sufficient for 120.

This matter of the dormitories is not reducible to arithmetic, but has been the subject of arithmetical debates that are not irrelevant. Petitioners, taking the dormitory by itself, calculate that the inmate has only 43.25 square feet of living space, far below the bare minimum set by correctional experts and some courts.[25] But this excludes the common area entirely. Respondents would divide the common area among the 120 people in the unit, arriving at 68 square feet per inmate for his share of dormitory plus common space. But this ignores the modular principle, neglecting the important fact that other jails (and cases) include relatively accessible gymnasiums, auditoriums, chapels, and outside recreational areas, none of which are divided up and "allotted" to individual inmates for purposes of calculating square feet of living space. Without playing more detailed games with numbers, the court is driven to conclude that petitioners' calculation is closer to the mark and that the "correct" number, whatever it is thought to be, is below an acceptable minimum.

---

[25] The American Correctional Association sets the standard at 75 feet. *Ambrose* v. *Malcolm,* 414 F.Supp. 485, 489, 492-493 (S.D.N.Y. 1976). Some decisions have accepted less. *Pugh* v. *Locke,* 406 F.Supp. 318, 334 (M.D.Ala. 1975) (60 square feet); *Gates* v. *Collier,* 423 F.Supp. 732, 743 (N.D.Miss. 1976) (50 square feet).



Concluding, as the court does, that doubling the occupancy of the dormitories is to be enjoined, we confront a somewhat nebulous question: where should the line be drawn? It seems improbable, if not impossible, that petitioners would have prevailed on this issue had room been made for an eleventh inmate, and no more, in each dormitory. In granting relief, then, it might be possible to guess our way toward some number well below 20 but possibly above 10. But respondents, having chosen simply to pile 120 men into spaces for 60, have tendered no evidence that could justify any confident determination of some intermediate number. Moreover, their tendency to exceed rated capacity in repeated and varied respects—in double celling, in the dormitories, in the balconies (*infra*), and elsewhere—counsels against sanctioning any departure of this kind. We apply wisdom of respondents themselves—especially in view of the fact that sudden influxes of short-term residents are routinely to be expected, and allowed for, in the MCC—when we hold the spaces to rated capacities in the absence of some solidly based rationale for doing otherwise.[26] The decree will order that the

---

[26] Respondent Warden recounted that shortly after opening the MCC, overflow inmates were housed in an area intended to be a magistrate's courtroom on the third floor. Originally this was limited to inmates stopping over en route between other institutions and "weekenders," but as pre-trial and sentenced inmates began to be assigned to the temporary dormitory, its use was discontinued to avoid the temptation to use the room as a permanent housing facility. The area is currently used as a staff lounge.

dormitories be used as they were meant to be, for 10 men each. Since this is a court of equity, both sides may appeal to the aspects of conscience and flexibility informing the familiar jurisprudence. An emergency —some powerful showing of necessity and suitability —may justify a relaxation at some future time. For now, however, the law and the evidence compel an order restoring the living conditions respondents planned and represented.

2. *Sleeping in corridors and common areas.*—With a frequency that respondents (having the detailed facts) have chosen not to identify exactly, but averaging several nights in substantially every week, inmates are assigned to sleep on cots in corridors, on balconies, or in other common areas because there is no room elsewhere to which they may be assigned. Respondents try to avoid this concededly unsatisfactory arrangement to the extent possible. Inmates are moved from the common areas as soon as room space opens for them, in order of length of stay in the open sections. Nevertheless, the practice is so regular and widespread that according to respondents' own evidence, people sleep in common areas for up to five or more days at a stretch. Further indicating the extent of the arrangement, as many as six to nine inmates have been assigned to sleep on a single balcony for one or more nights.

For a place of pre-trial detention, where it was known from the outset that there would be a large transient population, respondents must be found to



have acted arbitrarily and capriciously, in violation of their statutory duties, in allowing such a condition to prevail. The inmate assigned to sleep on a balcony or similar open space has, literally, zero square feet of his own living space. His cot is unfolded only at night. His belongings are stored in boxes taken from him in the daytime. The lights burn all night. However many happen to be spilled into the common area for the night, there is one bathroom available for all.

Admittedly distressed by this situation, respondents offer nothing sufficient to justify it. Here, as elsewhere, they tell of an overcrowded prison *system.* They tell of measures they have taken—placing immigration detainees elsewhere, renting a new Community Treatment Center, and adjusting bus schedules—, then despair of doing anything more. Considering all the marvels of modern transportation, the several other facilities within relatively short distances, and the known character of MCC uses, respondents demonstrate nothing like the compelling necessity that might justify an occasional night, if not whole weeks, on a balcony. The overall growth of prison population cannot be permitted to come as an ugly miracle upon our prison experts, justifying miseries and degeneration in advance of the opening of new and "modern" facilities. Aside from that, the sweeping explanation that things are overcrowded everywhere simply bypasses the concrete questions in this concrete case. To elaborate on a thought expressed earlier, "overcrowding" in Springfield, Missouri, or on the open spaces at Eglin Air Force Base,

or at the country barracks of Allenwood, or in maximum security prisons (assuming those places *are* all overcrowded) may mean quite different things, may generate quite different issues, and may allow of different (perhaps better) justifications than anything even suggested here. What we have in this case is a newly planned and newly built facility, supposedly constructed with foreseeable needs in view, and dedicated instantly to misuse and wretched living arrangements for those confined in it. Designed primarily for presumptively innocent detainees and others expected to stay for short periods, the MCC had to be known in advance as a place where there would be relatively large influxes and exoduses during short spans of time. Knowing that, respondents have proceeded from the outset to handle fully expected events as if they were astonishments and emergencies. Inmates arriving predictably in somewhat unpredictable numbers overload the place and have no proper area of any kind in which to sleep or live their time of confinement. The balconies and other common areas become in practical effect substantially regular portions of the sleeping accommodations.[27]

---

[27] The Government's expert, George Camp, First Deputy Commissioner of New York State Division of Criminal Justice Services, testified that common areas "should not be used on a regular basis" as sleeping quarters. It reflects no lack of deference to observe that expert opinion may not have been necessary to make the point. The grave discomforts, for those assigned to sleep this way and for everyone else, could have been predicted. The record of this case fulfills the prediction.



Such a swift perversion of a supposedly planned and newly opened jail cannot be allowed. The failure to plan for the most obvious needs, resulting in distress for inmates readily acknowledged by respondents to be grievous, must be deemed both (a) a violation of the statutory duty to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all "federal detainees, sentenced inmates, and witnesses in custody, 18 U.S.C. § 4042(2), and (b), more broadly, the kind of arbitrary and capricious action correctible under the Administrative Procedure Act.

The decree to be entered will forbid the use of MCC's common areas as sleeping quarters.

## C. VISITING

1. *Family and social visits.*—When this case began, inmates were allowed three visits per week. Visiting hours were:

| | |
|---|---|
| 2d and 5th floor: | 8:30-11:30 a.m., every day<br>4:30- 7:30 p.m., weekdays |
| 9th floor: | 8:30-11:30 a.m., every day |
| 3d, 7th, and 11th floors: | 12:30- 3:00 p.m., every day. |

Each inmate could have a list of six visitors, family or friends. On January 13, 1976, the respondent Warden gave four days' notice that he was curtailing both the hours and the allowable list of visitors. This remarkably brief notice, to both the affected inmates and the court, during a lawsuit, contrasted notably with the substantially longer notice the

Warden had given to the union representing members of the prison staff. Petitioners moved by order to show cause to prevent the abrupt curtailment. First by temporary restraining order, then by a preliminary injunction, the court granted the requested relief. 406 F.Supp. 1243 (1976).

Petitioners pressed at trial contentions that the visiting arrangements thus preserved *pendente lite* were inadequate. They presented testimony, supplemented by the court's observations, that delays in processing visitors and visting room conditions tended to abbreviate severely the time available for actual visiting within the range of seemingly available hours.

The detailed proof of these propositions covered the visiting process from the visitor's arrival to departure. The visitor arriving at MCC's entrance lobby fills out a form which is given to a guard. The form is checked against the inmate's visiting list, and the inmate's living unit is determined from a locator list. When a number of visitors have been so processed, a guard ushers them through a magnetometer, frisks each visitor with a portable metal detector, and searches female visitors' purses. The visitor's hand is then stamped with a password in an ink visible only under ultraviolet light. The guard calls the inmate's unit and informs a member of the staff that the inmate has a visitor. Visitors are then taken up to the residential floors.

On each floor, between the two modular units, there are two visiting rooms, one for each unit, separated by a central guard room. Visitors enter through



the guard's room and are ushered into the visiting rooms on either side. The visiting room, the dimensions of which are about 22′ X 19′, contains one or two couches and a number of chairs, often supplemented by chairs the inmates bring in from the common area within their units. The visitors' room has a bathroom adjoining it, but this, through most of the months this case was pending, had been locked and barred from use following a reported instance when an inmate had used it to change clothes and effect an escape.

Visitors are admitted into the respective rooms by the guard at the central desk. After the visitor's arrival, the unit guard locates the inmate, and brings him or her to the visitors' room. Visitors and inmates are observable from the guard's desk through the glass walls of the visitors' room.

There was persuasive testimony that these visiting procedures were so conducted that the processing of a visitor from lobby to visiting room could consume from 35 minutes to two hours, depending on the number of visitors at a given time. There were seemingly well-founded complaints that visting rooms became overcrowded, hot, and noisy. The range of visiting hours, compressed by the processing routine, contributed to the crowding, noise, and general discomfort, including frequent occasions when there were not enough seats for those in the room. Overcrowding led the guards frequently to terminate visits after stays of less than an hour, and well before the end of the ostensible visiting period. The

locked bathroom made it necessary for a visitor needing such facilities to sacrifice the time for a round trip to and from the lobby for that purpose.

Respondents proceeded through some remarkable changes of position during the pendency of this case. When he came on to testify as a witness, on March 27, 1977, the Warden, who had found in January, 1976, a need to cut visits sharply and precipitately, announced a liberalization of visiting privileges. Now, we have been assured, another guard will be added in the lobby for expediting the processing of vistors. In addition to existing morning hours, all visiting rooms will be open from 12:30 p.m. to 4:00 p.m. and again from 5:30 p.m. to 7:30 p.m., Tuesday through Friday. Additionally, each unit except the dormitory will have 3½ hours of visiting on Saturday and Sunday, alternating mornings and afternoons (i.e., Saturday morning and Sunday afternoon in one week, then Saturday afternoon and Sunday morning the next). The dormitory visiting room will be open both morning and afternoon sessions on weekends.

Having acknowledged that "the visiting program has not been completely problem-free," [28] but having improved the situation substantially, respondents observe that "[the new] system for visiting * * * provides substantial visiting opportunities for all inmates and clearly surpasses constitutional requirements." [29] There is an implication that further court intervention would be unjustified.

---

[28] Respondents' Post-Trial Memorandum 127.

[29] Id. 132.



There are, however, countervailing considerations of some consequence. As will appear further in the course of today's rulings, the respondents have repeatedly found it suitable during the pendency of this case to improve conditions of which petitioners complained. It is plain that most of these improvements have been spurred by the lawsuit and would not have happened otherwise. The visiting situation is in some respects the most striking and unsettling of all these incidents. Within the space of little more than a year, respondents have ricocheted from a decision that visiting should be more restricted to a conclusion that it will be liberalized.

Against this background, the matter is not fairly ended when we conclude, as the court substantially does, that respondents should not be ordered to allow more visiting opportunities and facilities than they have now confirmed. Whether or not the court would have ordered this much over respondents' opposition, we now have the clearest kind of demonstration that this much is feasible and approved by respondents themselves. The feasibility in the future will be even more certain under this court's decision, which elsewhere orders population decreases that will ease the pressure of numbers upon visiting procedures and facilities. In such circumstances, it seems wholly equitable to require that respondents not diminish or impair the stated arrangements at any future time except upon a showing of good cause for the change. The decree to be entered will so order. In the circumstances respondents have themselves created, "the

court's order should constitute no additional burden." *Zurak* v. *Regan*, 550 F.2d 86, 95 (2d Cir. 1977). Specifically, it will be adjudged that respondents may not decrease visiting hours or allow deterioration in visiting processes or faciilties except after notice to the court and petitioners of an intention to do so and a showing of good cause for such action to be made not less than 30 days after the giving of notice.

One other aspect of the visiting setup requires action by the court. As has been mentioned, after one was used in connection with an escape that should have been preventable in the light of the MCC's elaborate security arrangements, all the visiting room bathrooms were locked, and they stayed locked for a period of some eleven months. A week before the Warden testified, respondents effected another of their revisions *pendente lite*. The bathrooms are now accessible to a visitor upon request; a guard, equipped with the key, will open the facility and admit the visitor who has asked for this assistance. The court finds from its observation of all the pertinent circumstances—including the elaborate measures to ensure that only poeple duly stamped, inspected, and scrutinized pass through the series of locked doors to the outside—that the annoyance and indignity of this bathroom arrangement is not justified. Here and throughout, the court is keenly cognizant of the fact that prison officials, not judges, are primarily in charge of safety and security in places of confinement. At the same time, the court is not free to blink away the common awareness that zeal for security is among the most common varieties of official excess.[30] Here, having observed the locks, the array of closed-circuit TV cameras, the invisible ink, and the long, slow journeys of court and counsel through the security network on our several visits, the court is compelled to conclude that the locked bathroom, accessible only with a guard's help, is an arbitrarily and capriciously excessive item of protection, unjustified by the vague and unexplained history of one improbable escape. The visiting room bathrooms will be kept open, lockable only by the occupants, during visiting hours.



Having ordered that much, the court is not persuaded that petitioners have shown grounds for sundry other forms of claimed relief in relation to family and social visits. There is no constitutional or statutory basis for ordering the lengthened hours (8:00 a.m. to 10:00 p.m. daily), the unlimited rosters of visitors, the provision of a non-smoking room on each floor, and other amenities petitioners demand, however desirable some or all of these might seem to the court as a matter of policy. We note in this connection that another coincidence in the case has been the placement of soft-drink machines in the visitors' rooms while the court was hearing evidence about the absence of such luxuries. It is to be hoped that such improvements, however prompted, will continue. The court concludes, however, that it is not empowered to order them.

---

[30] See G. Sykes, *The Society of Captives* 19-21 (1958).

2. *Attorneys' visits.*—When this action was instituted, procedures and physical arrangements for attorney-client meetings, especially in view of MCC's primary function as a pre-trial detention center, were gravely deficient. A significant number of visits by attorneys were made in the general visiting rooms, under the same conditions of noise, crowding, and non-privacy as those attending social visits. In addition, the visiting rooms were open for meetings with attorneys after general visiting hours. With advance notice, counsel could have special visits in private rooms. There were serious problems of long delays and other inconveniences.

It has become unnecessary, however, to review in detail the situation for which the case was in part brought and to which much evidence was addressed. Again, "[t]he MCC has recognized that there have been problems with the attorney visiting facilities and procedures, and in order to remedy these problems, the institution has developed new facilities." [31] These improvements were announced by respondents shortly before the trial began. The new facilities are to include five attorney conference rooms as well as a larger common space furnished with conference tables. This area will be open from 8 a.m. to 8 p.m., seven days a week. A stairway, which attorneys may travel unescorted, will lead directly from the lobby to the conference area. Attorneys will be issued special identification passes, and it will no longer be neces-

[31] Respondents' Post-Trial Memorandum 118.



sary to give the advance notice formerly required for special visits.

Agreeing that these changes will substantially improve the circumstances of attorney visiting, petitioners request that the court order certain "refinements" in order to protect inmates' Sixth Amendment rights. The court has concluded that petitioners can demonstrate no right at this time to more than respondents have volunteered. It may be that the new arrangements, as yet incomplete and untested, will be found defective in one respect or another. As respondents' plans are projected, however, they seem amply to accommodate the need for attorney-client access.

Accepting the revised facilities and procedures as sufficient, the court will merely require, as in the earlier determination respecting social visits, that respondents maintain the promised improvements and neither effect nor allow deterioration in attorney-client visiting arrangements without prior notice and a showing of good cause.

3. *Visits with codefendants.*—Respondents report that an unnamed judge of this court in an unnamed case once "very strenuously objected" to the allowance of meetings between codefendants awaiting trial in the MCC. Seemingly built upon that episode is the current policy of denying such visits in the absense of specific court orders directing them. With all deference to all colleagues in every branch, the court finds the policy indefensible. Except for the unavoidably burdensome incidents of confinement, pre-trial

detainees have an elementary right to prepare for trial. The right must include for them, as it does for people on the outside, reasonable freedom to confer with codefendants. Respondents must supply such opportunities in the absence of a specific court order in a specific case forbidding this.

4. *Conjugal visits.*—With perhaps more proof than even a court might require, petitioners have demonstrated that the deprivation of sexual intimacies is a cause of tension, frustration, and anguish. A distinguished expert, Dr. Columbus B. Hopper, testified to experience in Mississippi and elsewhere indicating that conjugal visits are salutary and feasible. Other experts and inmate witnesses supported his view. Upon a substantial record of this nature, and invoking decisions protective of sexual privacy and freedom, e.g., *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), petitioners claim a constitutional right to conjugal visits. As the case developed, their use of the word "conjugal" became somewhat expansive; they presented as a star witness a married male prisoner and an unmarried female prisoner, both serving sentences, who seek conjugal visits with each other.

This extension of the position highlights what the court finds to be the essential flaw. The problems of sexual behavior, the extent to which sexual activity must be sacrificed for one perceived public necessity or another, the variety of beliefs about marital, nonmarital, and other kinds of sex, the kinds of deprivation suitably to be allowed as punishment—matters



like these are in the realm of mores and public attitudes outside the proper sphere of judges as judges. Whatever one judge or another might think about the difficult policy choices and psychological factors —for example, about the question of strictly "conjugal" visits in the traditional sense and their possible effects upon unmarried inmates—the decision of such matters must be left in the foreseeable future for elected representatives of the people.

Petitioners acknowledge the conflict of views on this subject among experts and policy-makers. Indeed, on a count of the voices, respondents, notwithstanding a quaint typo, are substantially accurate when they say petitioners' Dr. Hopper "admits that the dormant [*sic*] view of correctional experts in this country is still opposed * * *." [32] The weight of judicial authority is likewise adverse to petitioners. *McCray* v. *Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975); *Sandoval* v. *James*, No. C-72-2213 RFP (N.D. Cal., Oct. 3, 1975); *Lyons* v. *Gilligan*, 382 F.Supp. 198 (N.D.Ohio 1974); *Wayne County Jail Inmates* v. *Wayne County Board of Commissioners*, Civil Action 173-217 (Wayne Cy. Cir. Ct. 1971). But petitioners are not daunted. They do not acknowledge, they proclaim, the paucity of authority, saying:

> "Only one court has had the courage to find that inmates are entitled to conjugal visiting as a matter of constitutional right. *Government of*

---

[32] Id. 135.

*the Virgin Islands* v. *Gereau*, 3 Prison L.Rptr. 20 (D.V.I., May 30, 1973)."

With all deference, and without stopping over the meaning of "courage" in such a context, this court rejects the challenge. Whether or not there may be conjugal visits in federal jails or prisons is left for the Congress and the Executive to decide.

## D. TELEPHONES

Three subjects are argued with respect to the telephone service provided inmates at the MCC: (1) the extent to which respondents are in compliance with the preliminary injunction issued with respect to telephones earlier in this case, (2) petitioners' claim that the existing services should be expanded, and (3) the validity of Bureau of Prisons Policy Statement 7300.79 (2-20-73) ¶ 2 which permits the monitoring of inmate telephone calls.

1. *The outstanding injunction.*—Telephone service at the MCC is currently governed by order of this court entered October 1, 1976. Pursuant to that preliminary injunction, there are 23 pay telephones in the institution on which calls can be made to the 212 area. There are also 23 long-distance telephones on 11 trunk lines which are routed through a switchboard. In order to make a long-distance call, an inmate must pick up one of the receivers and wait for the switchboard operator to answer. The operator will then place the call, provided that the inmate has previously signed up to make it. It is this last requirement, when applied to collect calls, which petitioners charge violates the preliminary injunction.



In proceeding toward a conclusion on this point favoring the respondents, the court recalls that the preliminary injunction came into being when the Telephone Company (without fierce resistance from the MCC) was about to rip all telephones out of the MCC because of an alleged plague of fraudulent credit-card and third-party calls. The injunctive arrangements were devised to deal with that problem while assuring a decent amount of telephone service for the inmates. The debate then and since has featured complaints by petitioners that there were not enough telephones, that long queues resulted to make calls, and that the situation led frequently to angry encounters and threatened violence among the inmates. It was in that setting that long-distance calls were ordered to be either collect or "pre-paid," the latter meaning payment would be made from the inmate's commissary account. Petitioners accept the system of advance sign-ups for pre-paid calls, but complain that the procedure is a gratuitous obstruction for collect calls. At the same time, not quite consistently, they charge, as has been noted, overtaxed telephone facilities, leading to frustration and conflict.

Much is made in the briefs on this issue concerning what was or was not intended by the preliminary injunction. The court concludes, however, that this is not now a matter of great interest. We are proceeding to a final decree. For that purpose, the court con-

cludes that the sign-up requirement for collect calls is a reasonable and valid measure. It serves petitioners' own stated objective of avoiding disputation over limited telephone facilities.

2. *Adequacy of telephone service.*—Petitioners complain variously about the number of telephones, delays in raising the MCC operator for long-distance calls, and the wall-mounted instruments which afford less privacy than would booths.

No claim for relief has been proved on this score. The evidence of overburdened telephones is neither impressive on its own nor improved by the court's own observations. The telephone service is undoubtedly imperfect. But it is in its setting adequate, if not generous.

3. *Monitoring.*—Respondents claim the power to "monitor" telephone calls, a position embodied in Bureau of Prisons Policy Statement 7300.79 (2-20-73), which says in relevant part:

> "2. *Monitoring Calls.* Each institution will establish procedures which will enable the monitoring of phone calls, said monitoring to be done to preserve the security and orderly management of the institution, and to insure that institution policy governing the use of phones is being followed."

MCC Policy Statement 7300-79 ¶ 7 (10-12-76), adopted pursuant to the Bureau of Prisons Statement, adds:

> "It should be pointed out, however, that Bureau Policy concerning access to attorneys allows inmates to place calls to their attorneys that are private. In keeping with the spirit and intent of this Policy, the MCC will not under any circumstances monitor attorney-client calls."



Petitioners assail the asserted authority to monitor, however it may be limited, and now seek an injunction against it. The point, if properly presented, would be substantial.

Respondents answer, however, and the court agrees, that the question has not been timely or suitably raised. It was not in the first amended petition or in any later amendment. The only pertinent testimony in the record is fragmentary and more or less accidental. Respondents had no occasion to develop, by evidence and otherwise, supposed justifications. On the contrary, defendant Warden's contribution, on cross-examination, was to report that no calls have in fact ever been monitored in the MCC. On such a record, the court should not and will not reach one of the few conceivable issues petitioners managed not to include properly in this case. Cf. *Browning Debenture Holders' Committee* v. *DASA Corporation*, 560 F.2d 1078, 1086 (2d Cir. 1977).

This leaves the subject of telephones where it has been since the preliminary injunction issued last October. Respondents have not appealed that order, nor have they offered new evidence or arguments to change it. Petitioners' arguments for additional relief have been overruled. It follows that the court should and will embody the terms of the preliminary injunction in the final decree.

## E. MAIL

Several issues concerning mail were disposed of by summary judgment last January, when the court enjoined the reading of outgoing mail, sustained respondents' practices on "legal mail" (from attorneys and courts), and restricted respondents' surveillance and scrutiny of other incoming mail. 428 F.Supp. at 342-344. Some residual problems remain with respect to legal mail and respondents' procedures for delivery and forwarding mail.

1. *Legal mail.*—In ruling on the summary judgment motions, the court held adequate respondents' practices safeguarding the confidentiality of legal mail—namely, their rules allowing opening (not reading of) such mail for contraband, but only in the recipient's presence. It has become evident, however, that there is less than rigorous enforcement of these restrictions; in repeated instances, too numerous to be allowable slips, letters of this nature are delivered to the inmates after having been opened outside their presence. The record makes it appropriate that the court's decree command adherence, subject to appropriate sanctions for violation, to the agency's own rules.

There is in this connection an unnecessary dispute about the scope of "legal mail" for present purposes. After the court's decision of January 19, 1977, the Bureau, on May 23, issued revised regulations advising inmates that all "Special Mail," suitably marked, would be handled with the restrictions now approved



and ordered for correspondence from attorneys and courts. "Special Mail," in addition to that from federal courts and attorneys, includes under the revision correspondence from "members of Congress, embassies or consulates, the U.S. Department of Justice, governors, State attorneys general, prosecuting attorneys, [and] state courts * * *."[33] No reason is suggested why the court's decree should be narrower. The decree will, in any event, be coterminous with the regulations.

2. *Delayed mail.*—There are complaints that mail is unduly delayed after it reaches the institution before delivery to inmate addressees. This is perhaps a difficult, but not an impossible, contention to prove, as reflected in court orders requiring prompt deliveries, *Mitchell* v. *Untreiner*, 421 F.Supp. 886, 902 (N.D.Fla. 1976); *Collins* v. *Schoonfield*, Civ. No. 71-500-K (D.Md., July 27, 1972); *Boldings* v. *Jennings*, No. 76-73C2, 3 Prison L. Rptr. 259, 260 (W.D.Wash. 1974); *Lambert* v. *Skidmore*, No. C-2-74-135 (S.D. Ohio, May 30, 1975). But there is no convincing proof of the charge in this case. There is evidence of mail delayed in the Christmas season, but this is familiar on both sides of the prison walls. The claim of delayed pickups of outgoing mail is no more solidly supported. Petitioners' complaints on these subjects are rejected.

---

[33] 42 Fed.Reg. 26,333, 26,336 (May 23, 1977) (to be codified in 28 CFR § 540.11).

3. *Non-forwarding of mail.*—When an inmate is transferred from MCC to another institution—often abruptly as will be discussed—mail thereafter received is not forwarded, but returned to the sender. Acknowledging this, respondents insist upon their right to continue the practice. They say:

> "Since there is no evidence indicating that inmates are unable to send change-of-adderss notices to the local Post Office station either before or after the transfer, there is no reason to impose that burden on the MCC." [34]

Even if such cold niggardliness is not a characteristic note, one might have hoped for its omission. The court does not sit, of course, to enforce magnanimity in government. But this is a clear case where a callous and ungenerous position happens also to be unsupportable in law.

It is not to be doubted that the distinguished respondents in this case appreciate the fundamental human needs answered by the mails to people in confinement. See, e.g., if citation is needed, *Taylor* v. *Sterrett*, 532 F.2d 462, 481 (5th Cir. 1976). Yet the bureaucratic indifference exercised in respondents' names brushes past simple decency for no good reason whatever. In the nature of the situation, inmates' mail will be returned to sender, not forwarded, when they have had no chance at all to redirect it for themselves by filing change-of-address notices. This is so, obviously, because transfers are sudden, often occur-

[34] Respondents' Post-Trial Memorandum 185.



ring after the sending, but before receipt, of the letter MCC finds itself unwilling to forward. Even where this is not so, the "burden" that worries respondents is inconsequential. The piece of mail must be handled in any case—whether to be returned or sent to its addressee. The extra trouble of digging out and writing a forwarding address—a beneficence commonly performed by irate former landlords, jaundiced ex-employers, and others not looked to for public examples of caring—is of no meaningful weight in this setting. Finally, as respondents must know as well as anyone, they deal with a group in which literacy, attention to workaday detail, and knowledge of agency procedures may be less prevalent than it is in the population at large. If an inmate neglec' 'or does not know about) a change-of-address notice, MCC personnel might find ready means to supply the omission rather than fight for the right to return the mail to its sender. The court will not compel, though it presumes to suggest, this procedure.

The court holds, however, in any event, that the refusal to forward mail is a species of obstinate neglect of vital needs that qualifies classically as arbitrary and capricious official conduct, totally unsupportable by any reason that can be deemed sound or sufficient in the circumstances. The court will order the relief petitioners seek in this respect.

## F. SEARCHES

Two areas of dispute remain under this heading following the court's earlier decision, on summary

judgment, 428 F.Supp. at 341-43, requiring that petitioners be given receipts for things seized from their quarters: (1) the propriety of strip searches as routine procedures following visits, and (2) the practice of excluding inmates when their sleeping areas and possessions are being searched. On both subjects, the court concludes, petitioners are entitled to some relief.

The broad principles governing these questions as of now may be briefly summarized. It seems evident that people in confinement enjoy at least some of the Fourth Amendment's protection "against unreasonable searches and seizures * * *." *Bonner* v. *Coughlin*, 517 F.2d 1311, 1317 (7th Cir. 1975) (Stevens, J.); *Hodges* v. *Klein*, 412 F.Supp. 896, 899-903 (D.N.J. 1976), collecting cases. Undoubtedly the protection "does not rise to that possessed by the unincarcerated members of society." *Bonner* v. *Coughlin*, *supra*, at 1317. But there are points, which the court finds to have been transgressed in this case, beyond which searches and seizures, even in a jail, must be condemned as constitutionally "unreasonable."

There are also due process boundaries set by "the community's sense of fair play and decency." *Rochin* v. *California*, 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1951). These limits, too, are exceeded by the forms of strip search respondents employ.

1. *Strip searches*—Under the questioned practice, every inmate—including pre-trial detainees held on charges ranging from mail embezzlement through stock fraud to narcotics dealings and bank robbery—



undergoes a strip search upon returning to his quarters from any visit. In the presence of a corrections officer, the male inmate must remove his clothes, display his armpits, open his mouth, raise his genitals, display the bottoms of his feet, and spread his buttocks for visual anal inspection. Female inmates must follow a similar procedure, including a visual vaginal inspection. The testimony of inmates and experts alike reveals qualities in this experience that a court might come close to noticing judicially. The stripping is unpleasant, embarrassing, and humiliating. The spreading and lifting of genitalia and the bending over to spread buttocks for anal inspection plunge the reaction to a level of deep degradation and submission. The postures petitioners are compelled to assume are calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict. In the MCC, as elsewhere in such situations, male correction officers have been incited by the temptation to indulge the sense of a cheap *machismo*. There have been insultingly suggestive remarks and banal but terrifying expressions of aggression like those of guards threatening in the time of nakedness to "put [a] foot up [the] ass" or merely to "kick the ass" of the humbled prisoner. The court credits the testimony of inmates who have found this so high a price as to forego visits or to feel after a visit that it was not worthwhile.

A psychiatrist called by respondents acknowledged that the strip search experience "is something that

may not be wished," but went on to say "that it is part of the reality of the circumstance in which it is not only appropriate from a standpoint of the institution's security, but is something to which people can adapt and recognize and I would doubt that anybody was so severely upset by such an experience that they would require psychiatric care or, again, that there is a question of after effects of it." Accepting the psychiatric observation, if *dubitante*, but not those on security, the court holds that constitutional injury may occur short of emotional trauma leaving scars or requiring treatment.

The asserted justification for this grisly procedure is, of course, the claim that it is needed for security against the smuggling of weapons, drugs, and other contraband. As for specific experience, one female officer once espied in a prisoner's vagina a red balloon containing heroin. Another testified to discovering drugs in an inmate's shoes. There was no evidence that anal inspections had ever revealed any attempts at smuggling, and this is no surprise. The evidence is clear and uncontradicted that a person bent upon this mode of transport could insert an object beyond the anal spincter and render it invisible until its retrieval at some private moment later on.

But it must be added that the case for respondents is not ended with their slender proof of actual episodes when smuggling attempts were thwarted in strip searches. Defendant Warden and Bureau Director, among others, testified to a belief, which has a measure of pluasibility, that the prospect of the



strip search may serve as a deterrent to people planning to secrete and import forbidden things. The fact that the judgment is neither quantifiable nor flatly demonstrable does not deprive it of the authority with which respondents' experience and expertise must be deemed to invest it. Giving full weight to this factor, the court finds that it cannot justify the more extreme and offensive aspects of the strip search.

The test of reasonableness requires attention to the total setting. It is significant, therefore, that the inmates and their visitors are in full view during the visits and fully clad. The secreting of objects in rectal or genital areas becomes in this situation an imposing challenge to nerves and agility. The challenge, it must be expected, is surmountable by some, but likely in itself to deter many or most, especially pretrial detainess who may be hoping to vindicate their presumed innocence and may be hesitant to accomplish a new crime in the very arms of the law. For the probably slim minority who might attempt to smuggle things in their bodies, there remain search techniques short of the loathesome practice now in force. The paramount worry is, or ought to be, over possible importation of weapons or other dangerous instruments. These are discoverable by metal detecting devices and, if necessary, other equipment employed for airline security and other purposes.

There remain other things, mainly narcotics, that might still be secreted and evade detection. How serious this problem may be—and how far control-

lable by measures like the usual searches and urine tests—it is not possible to say with confidence. What we can know is that the goal of absolute security is unattainable, and we must assume that some contraband will continue to make its way into jails and prisons, as it always has—whether through visitors, guards, lawyers, clergymen, or otherwise. The court does not propose to treat lightly the security concerns of respondents. In today's resolution of the strip search problem, respondents will be permitted to go as far as may be permitted by the demands of reasonableness in the Fourth Amendment and the claims of decency in the Fifth.

The court concludes, upon the record and the developing precedents,[35] that respondents must cease

---

[35] The decided cases cover a range that does not amount yet to a settled or definitive jurisprudence. In conditions of high security risk, in cases distinguishable from ours, searches of the kind in question have been allowed. *Daughtery* v. *Harris*, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872, 94 S.Ct. 112, 38 L.Ed.2d 91 (1973); *Hodges* v. *Klein*, 412 F. Supp. 896 (D.N.J. 1976); *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 (S.D.N.Y. 1975); *Penn El* v. *Riddle*, 399 F.Supp. 1059 (E.D.Va. 1975); *Gettleman* v. *Werner*, 377 F.Supp. 445 (W.D.Pa. 1974); *Bijeol* v. *Benson*, 404 F.Supp. 595 (S.D.Ind. 1975). A recent decision of an eminent colleague in the Northern District of New York goes farther in outlawing the practice than this court will in this case. *Frazier* v. *Ward*, 426 F.Supp. 1354, 1366 (N.D.N.Y. 1977). The court in *Frazier* held anal searches to violate both the Fourth and the Eighth Amendments as applied to the States by the Fourteenth. Other authorities arrayed against "the indignities of a rectal search," *Sostre* v. *Preiser*, 519 F.2d 763, 764 (2d Cir. 1975), in at least some circumstances include *Hodges* v. *Klein*, *supra*, at 903; *United States ex rel. Guy* v. *McCauley*, 385 F.Supp. 193 (E.D.Wis. 1974); and ABA Standards § 6.6(f)(iii).



the routine requirements of anal and genital inspections after visits. These affronts, repulsive in the most evident respects, are not warranted by the suspicions upon which respondents have proceeded. In all the circumstances, the demands of security are amply satisfied if inmates are required to disrobe, to have their clothing subjected to inspection, and to present open hands and arms to demonstate the absence of concealed objects. Even this much the court allows with grave reluctance, inviting reconsideration by wiser judges or respondents themselves in the more mature wisdom of future times. For now, however, sensitive to the primary authority of respondents for the protection of life and property, the court will forbid only the extreme measures of indignity now practiced. These, it is held, are unreasonable and "shocking," and thus forbidden by the Fourth and Fifth Amendments.

Also left to respondents by this ruling is the possibility of visually inspecting anal or genital areas upon a specific and particular demonstration of probable cause for doing so. In the rare cases where this may happen, the details of the probable cause must be recorded in writing, upon sworn statements of first-hand knowledge. The record will include the reasons, circumstances, and results of the search. A copy will be given to the inmate and preserved for later reference if and when a particular search or the practice in this regard comes again to be questioned. Cf. ABA Standards § 6.6(f)(iii).

2. *Room searches.*—The living areas of the MCC are searched at irregular intervals, and the searches are unannounced. The searches are of two types: formal unit shakedowns and informal searches of individual rooms (which are the more frequent type). For formal shakedowns, a team of guards clears the inmates from a particular portion of a living unit and searches each room. The inmates are not permitted to watch the searches. Correctional officers have discretion to allow an inmate to watch the informal search of his individual room. It is unclear how or how often this discretion is exercised.

Petitioners protest against the practice of barring them from positions where they may observe the searches of their rooms and possessions. The complaint rests upon some elementary concerns. In the MCC, as frequently happens elsewhere in the conduct of official searches, the few possessions of inmates are not treated with tenderness. Officers rummaging through clothing, papers, drawers, and other things, supposedly obligated to be neat, frequently aren't. Possessions are left in disarray. It is charged—but the court finds it unnecessary (indeed, impossible on the present record) to decide one way or another—that possessions are stolen by searching officers. This complaint had special point and urgency in the past, when respondents gave no receipts for seized property, a practice enjoined by the court on January 5, 1977, 428 F.Supp. at 342. The suspicion or belief remains a vital source of tension and hostility.



Allowing inmates to observe from a reasonable distance the searching of their rooms would go far to eliminate these grounds of complaint. An officer viewed by the owner is more likely to fulfill the stated duty to put things back as they were. The claim of stolen property is far less likely to be made, the grounds for suspicion, or ostensible suspicion, being largely obviated. Having one's things searched is no pleasure in the best of circumstances. Being denied the right even to watch the invasion is a blunt oppression.

Respondents justify the exclusion on two grounds. As phrased by defendant Warden Taylor,

> "the [first] reason * * * is to prevent inmates from distracting officers who are doing the searching and moving contraband from one area to another ahead of the search party. * * *
>
> "The other consideration is that during searches there sometimes arises a situation in which the inmate becomes argumentative and conflicts do develop between staff and inmates over the search."

These grounds are thought and urged by the Warden to override his view, expressed in the same response, that "it is important to preserve [and respect] as much as possible * * * the property of the inmate."

The court concludes that, at least with respect to pre-trial detainees, the Warden's appraisal of the competing interests cannot be sustained. The presumptively innocent prisoner's acknowledged interest in privacy and, it may be added, in minimal dignity,

may be overriden only upon a demonstration of compelling necessity. *Detainees of the Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975). The undocumented worries of respondents have neither the quality nor the substantiality to supply the demonstration. The ingenuity of experienced jailers is sufficient, surely, to prevent the successful movement of contraband from hand to hand while the officers are on the spot.[36] As to the threat of arguments and conflicts, this is always present, and subject to stern control, in the jailhouse. Prisoners may become disagreeable, or even violent, anywhere—at the meal table, at play, in the TV room. When that happens, authority must be asserted. If necessary, the prisoner must be moved away from the place of disturbance. But the possibility of disturbing behavior does not justify exclusion from the place where it may happen—from the dining area, TV room, etc. At least until or unless respondents can show a pattern of violence or other disruptions taxing the powers of control—a kind of showing not remotely approached by the Warden's expressions—the security argument for banishing inmates while their rooms are searched must be rejected.

---

[36] Respondents point to testimony that an officer once intercepted a package of marijuana being thrown by one inmate to another when he observed the search team approaching the unit. This is beside the point, of course; the alleged incident was not prevented by the procedure here in question, and there is no basis for finding that recurrences would become more probable if inmates could observe after the search party arrived and went to work.



In so holding, this court follows the high authority of Judge Lasker in *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 844-45 (S.D.N.Y. 1975).[37] Following that precedent with respect to pre-trial detainees, this court refrains from extending it to convicted inmates. The wisdom of removing *any* prisoner from his quarters during a search may well be questioned. If, as this court now holds, the practice is to be forbidden for pre-trial detainees, respondents may wish to reconsider it for others. Nevertheless, confining itself to the sharp limits of its powers, the court is unable to conclude that the procedure is "unreasonable" in Fourth Amendment terms for convicted inmates. For them, the asserted necessities need not be "compelling." While the Warden's explanation of the position is not overpowering, it is certainly not weightless. For the treatment of sentenced inmates, it passes the constitutional test.

## G. PERSONAL PROPERTY

In a society which holds property more sacred than perhaps it should, a person's identity and self-respect are deeply entwined with material possessions. We are accustomed to prize as basic necessities an array of balms, toys, and physical amenities that people in a simpler age knew or cared nothing about. It becomes a severe discomfort, to say nothing of self-respect and security, to do without a watch, ac-

---

[37] The inmates in the cited case were pre-trial detainees specially classified as "security risks." In that respect, the petitioners herein have a stronger claim.

customed gadgets, cosmetics, minor items for personal adornment, things to eat, drink, smoke, and chew without regard to nutrition or necessity in the sense of survival. The strong dependence upon material things as assurances that we exist gives rise to one of the deepest miseries of incarceration—the deprivation of familiar possessions ranging from the dwelling place to its furnishings to automobiles, a wardrobe, however modest, and other paraphernalia supporting life in freedom for most of us.[38]

This aspect of incarceration is notably severe in the MCC. In contrast with its early billing as a showplace, conformably to the habitual stance of the Federal Bureau as a leader of penal enlightenment, the MCC's rules and practices governing possessions allowed to inmates have been markedly more restrictive than those in numerous state facilities, including a number of highly secure prisons. Petitioners have attacked these rules and practices. The attacks have in some respects been found to be well grounded.

1. *Confiscating property.*—When this case began respondents claimed and exercised the powers to search an inmate's cell, barring any opportunity for the occupant to see what was happening; to seize property upon an officer's deciding it was "contraband;" to give no receipt or other account of what was seized; and to keep the property permanently, ostensibly for "The Government" but with no way in

[38] See G. Sykes, *The Society of Captives* 67-70 (1958): E. Goffman, *Asylums* 20 (1961).



fact for anyone ever to know or question what had actually happened to it.[39] This regime of absolute and unquestionable tyranny was not softened by a sweeping definition of "contraband," which purported to embrace "any item or article inside an institution that was not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an authorized staff member." [40] On a motion for summary judgment, the

[39] Property, except for currency, which is seized as contraband is generally supposed to be turned over to the Chief Correctional Officer and destroyed under his supervision. On occasion, seized property is returned to an inmate's family or turned over to appropriate law enforcement officials. Currency seized by the respondents is supposed to be deposited in a Miscellaneous Fund maintained by the Department of the Treasury, and is not returned to the inmate from whom it was taken.

[40] The quotation is from the Bureau's Custodial Manual, Policy Statement 2001.1B, § 702, which reads more fully as follows:

> "1. Contraband may best be defined as any item or article inside an institution that was not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an appropriate staff member. Authorized items may be considered contraband when found in excess quantities, or altered from original status.
>
> "2. The following items shall always be considered contraband, within any federal penal or correctional institutions:
>
> "a. Guns and firearms of any type.
> "b. Ammunition, explosives.
> "c. Knives and tools not provided [according to regulations].

[Footnote continued on page 160a]

court ordered that respondents give receipts for seized property, 428 F.Supp. at 342, a step that might have led respondents to supply some explanation for the seizure and some opportunity to contest it. Respondents continue to insist, however, that there will be and need be no procedure by which an inmate can question the taking of property on an officer's pronouncement that it is "contraband." Petitioners are entitled to have this stance corrected, for it is, in the most severe and unrelieved terms, an assertion of power to take property without due process of law.

It should not be necesary, though it evidently is, to affirm in 1977 that federal prisoners, and most obviously confined people who have been convicted of nothing, are protected by the Fifth Amendment against takings of things in their possession without at least some chance to dispute the action and to justify the possession. *Wedle* v. *Director, Patuxent Institution*, 405 U.S. 1036, 92 S.Ct. 1318, 31 L.Ed.2d 577 (1972), vacating and remanding 436 F.2d 342 (4th Cir. 1970), for consideration in light of *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972); *Sell* v. *Parratt*, 548 F.2d 753, 757, 759 (8th Cir. 1977), cert. filed No. 76-1339 (March 28, 1977); *Kimbrough* v. *O'Neil*, 523

[40] [Continued]

"d. Hazardous and poisonous chemicals and gases.

"e. Narcotics and drugs. These can be dispensed and in the possession of offenders only as authorized by the institution medical department.

"f. Intoxicants, such as liquor and alcoholic beverages.

"g. Currency, where prohibited."



F.2d 1057 (7th Cir. 1975), aff'd on reh. en banc, 545 F.2d 1059 (1976); *Russell* v. *Bodner*, 489 F.2d 280 (3d Cir. 1973). Robustly opposing that proposition, respondents sound some chilling notes. There is no need for any opportunity to contest the confiscation, they say, because:

> "[i]f the confiscation of a particular item is improper, the inmate has an adequate remedy in a common law action for reverter or conversion as well as a constitutional action for damages under the Fifth Amendment." [41]

If that were an answer, every official, high or low, could enjoy it as justification for lawless confiscations. The assertion is, moreover, uniquely astonishing when made by an agency that should normally be heard to insist upon exhaustion of its own administrative remedies before complainants haul it into court. Enough has been said to indicate why the court must regret and reject the proposal of high federal officers that their conduct be tested in state courts by the quiddities of old common-law writs.

This court holds that respondents must afford an inmate some method of contesting a confiscation. The procedure need not be elaborate, certainly nothing like a case for reverter or conversion. In most situations, there will probably be no need for any semblance of a hearing. But procedures must exist providing for at least the following:

[41] Respondents' Post-Trial Memorandum 216.

(a) A brief statement to the inmate of the asserted justification for the seizure.
(b) A notice of the right to respond in some reasonably simple and convenient fashion and assert grounds, if any, why the seizure is claimed to have been unwarranted.
(c) Some suitable opportunity to meet and answer controverted evidence throught to warrant confiscation.
(d) A decision, with reasons, however brief.

Mindful here and throughout that it is respondents who are primarily responsible for the MCC's governance, the court will not now prescribe the procedures in detail. The decree will require that they serve and file new procedures conforming to the directives outlined above, on the 90-day timetable, with 15 days for objections, prescribed earlier.

2. *Packages.*—MCC inmates are forbidden to import or receive packages of food or things like watches, radios, and sweat shirts, except for one Christmas package, though items of this nature may be purchased from the commissary. This restriction is sought to be justified on the present record by "dire predictions" which are not only unsupported by evidence, cf. *Goodwin* v. *Oswald*, 426 F.2d 1237, 1244-45 (2d Cir. 1972); *Rhem* v. *Malcolm*, 371 F. Supp. 594, 626 (S.D.N.Y.), aff'd and remanded, 507 F.2d 333 (2d Cir. 1974), but in several instances belied by experience or by respondents' own self-contradictions.

The record herein and the law books reveal repeated instances where prisons, often housing con-



victed inmates under close security, allow (or have been ordered to allow) the receipt of packages and the ownership of personal property more extensive than the MCC permits. See, e.g., *Feely* v. *Sampson*, Civ. Action No. 75-171 (D.N.H., Sept. 14, 1976); *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 842 (S.D. N.Y. 1975); *Miller* v. *Carson*, 401 F.Supp. 835, 840 (M.D.Fla. 1975); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676, 693 (D.Mass. 1973), aff'd, 494 F.2d 1196 (1st Cir.), cert. denied *sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974); *Moore* v. *Janing*, Civ. No. 72 0 223 (N.Neb., March 8, 1973); *Bishop* v. *Lamb*, LV-1864 (D.Nev., Aug. 27, 1973). So, for example, inmates in New York State institutions may receive a 35-pound package of food each month, in addition to clothing and magazines. New York State prisoners may also possess electric razors, typewriters, and stationery.

The evidence of what is done elsewhere is not controlling upon respondents. But it does call upon these administrative experts to make some reasoned showing, surely for unconvicted people, as to why there must be deprivations at the MCC so much harsher than deemed necessary in other institutions. *Procunier* v. *Martinez*, 416 U.S. 396, 414, n.14, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Moskowitz* v. *Wilkinson*, 432 F.Supp. 947, 951 (D.Conn. 1977). Respondents have made no such showing. Their restrictive rules in this light must be held to be arbitrary and capricious,

not merely as to pre-trial detainees, but as to all those in the Center.

The compelling drive toward this conclusion becomes more palpable against the justifications respondents offer. They invoke, as everywhere, the claims of security: weapons, drugs, and whatnot will enter in packages. But there has been not even an attempt to show why protective measures, familiar in use at other institutions, could not serve here.

Then it is urged that allowing personal property in jail will "provide the materials for buying favors among inmates or between inmates and staff, for gambling activities, and for the use of strong-arm tactics and other similar types of activities which are well-known and of real concern to correctional administrators * * *." [42] Similarly, respondents profess to worry about thefts, conflicts, and "aggravating the factor of economic inequality * * *." [43] These are not more solid than other ghosts, and respondents themselves help to prove it. The commissary offers items of substantial cost—e.g., $18 sneakers and $27 radios—serviceable for favors, for demonstrated inequalities, and other possibly baleful uses.[44] Apart from that, we all are, or ought to be, aware enough of past and present concentration camps to know that crumbs and scraps are enough to evoke propensi-

---

[42] Id. 211-212.

[43] Id. 212.

[44] Commissary arrangements present issues of their own, considered and decided below.



ties toward bestiality and mutual exploitation.[45] Petitioners may have allowed themselves to soar a little when they attack respondents' "pseudo-socialist principles." [46] The fact remains that it only demands a pseudo-equality to insist that all must be deprived arbitrarily, however much greater the deprivations of some than of others.

Respondents also urge that packages will bring "sanitation and storage problems * * *." [47] Again, this is inconsistent with their own purveying of food that may attract vermin and require storage. Moreover, if packages are to be allowed, as they will be by this court's order, there is no doubt about respondents' authority to control volume, the nature and management of food, and other factors of genuine concern for decent housekeeping.

Finally, some note must be taken of the argument that for inmates serving sentences "the restrictions on the possession of personal property also serve the legitimate purpose of punishment." [48] This is a curious argument indeed. Most of us in the federal law business associate respondent Director Carlson with a good deal of penological wisdom extending well beyond, but surely including, the maxim that people are sent to prison *as* punishment nor *for* punishment.

---

[45] See, e.g., A. Solzhenitsyn, *One Day in the Life of Ivan Denisovich* (1963).

[46] Petitioners' Post-Trial Memorandum 374.

[47] Respondents' Post-Trial Memorandum 212.

[48] Id. footnote **.

*A fortiori*, the acknowledgment that defendants awaiting trial, and not lawfully subject to any punishment, are being punished in this way is a substantial confession of error, whether calculated or not. And it is, furthermore, a declaration that jailers are determining forms of punishment with no suggestion that their statutory powers were meant to embrace that profound responsibility.

The court concludes, in sum, that respondents have failed to offer any but arbitrary and unacceptable grounds for their stringent limitations upon personal possessions. Upon the record before the court, it seems clear that inmates should be free to retain or receive at least items of the kind available on order from the commissary. Once again, the precise details are primarily for respondents to formulate. As in the case of regulations concerning confiscations, and on the same terms and timetable, respondents will prepare and submit suitable regulations governing this subject.

## H. CLOTHING

Inmates at the MCC are not permitted to wear their own clothing except for sweat clothes and footgear on sale from the commissary. At the Receiving and Discharge Unit, they are issued underwear and jumpsuits. The jumpsuits are brightly colored—red, orange, yellow, and blue. The suits frequently do not fit. In fact the supposed flexibility of jumpsuits—in size and interchangeability between men and women—is one reason the respondents give for using



these uiforms. Inmates complain that the suits are often wrinkled and sometimes torn. It is awkward to use the toilet while wearing them.

Inmates testified that the uniforms are "degrading," "dehumanizing," "depersonalizing," "an embarrassment." Some found them most distressing during visits, feeling embarrassed to have their families and friends see them in what they referred to as "clown suits," "monkey suits," or "Santa Claus suits." Petitioners' experts testified that requiring inmates to wear uniforms such as these is psychologically destructive, a "negation of their individuality." On the other hand, an expert called by respondents testified he wore one of the jumpsuits for 10 hours and did not find it degrading.

It is easy to be skeptical, even cynical, about the testimony *pro* and *con* concerning the psychological impact of MCC jumpsuits. For a litigious inmate, the idea of "degradation" or embarrassment may roll trippingly off the tongue. For a visiting expert, headed for freedom and privacy after the day's work, it is no feat to feel at ease in the very temporary garb assumed for an unreal experiment.

It has proved useful, therefore, to have the benefit of several periods of direct observation. The evidence of the court's eyes has tended to sustain petitioners' contentions. The jumpsuits are in fact garish. The MCC's personnel in charge of fitting will win no awards. The inmates are often discovered in uniforms several sizes too large, looking funny in a way likely to amuse only others. There is every reason

for the court to credit the reports of discomfort, embarrassment, and felt stigmatization, not least in the reflection seen in the eyes of visiting family or friends.

Without much defending the uniforms on sartorial grounds, respondents urge the necessity for this attire to distinguish inmates from others and thus promote the jail's security. The argument is unsupported by substantial evidence or plausible reason. Security in the MCC is elaborate; there are possibilities of escape, but they are almost negligible. Most inmates are confined to the unit for nearly 24 hours a day. While this may change, as the court hopes, there remains an impenetrable outer perimeter, defended by TV screens, double sets of doors, a closely guarded corridor, and extensive communications devices. Nobody enters without the invisible ink stamp. Nobody leaves without displaying it.

In the face of these facts, the requirement of uniforms rests upon foundations so tenuous as to be arbitrary and capricious. For pre-trial detainees, the best of uniforms is a dubious restriction. There is wide acceptance of the U.N. Standard stating: "An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable." U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 88(1). Whether or not the Federal Bureau can manage to attain that standard, endorsed by many nations much less wealthy, it cannot justify compelled dress in a costume understandably experienced as humiliating in addition to its qualities of physical discomfort. As for sentenced prisoners, it is by now



a matter of minimum decency that prisoners should, subject to security requirements, be "entitled to choose any * * * clothing they wish," ABA Standards § 6.7, or at least, where uniforms are required, be given clothing which "shall in no manner be degrading or humiliating." U.N. Standards, *supra*, Rule 17(1).

The practice of taking inmates' underwear and replacing it with government issue, often used, is altogether indefensible, and is not noticeably defended.

Upon the findings and conclusions thus outlined, the court will order as follows with respect to clothing:

(a) Pre-trial detainees will be permiteed to wear their own clothing unless they volunteer to wear uniforms issued by the MCC. *Accord*: *Forts* v. *Malcolm*, 426 F.Supp. 464, 468 (S.D.N.Y. 1977).

(b) Uniforms for men shall consist of shirts, slacks, and other conventional items. Uniforms for women shall consist of (i) dresses, (ii) blouses with skirts or slacks, or (iii) other items of standard apparel.

(c) Sentenced inmates will either be permitted to wear their own clothing or, unless they volunteer to wear one of the existing supply of jumpsuits, will be issued uniforms of the kind prescribed in"b," *supra*.

(d) Issued clothing will fit the wearer with reasonable accuracy.

(e) Inmates may wear their own undergarments or be issued new ones.

These provisions, given the limits of the court's expertise in matters of dress, are subject to reconsideration and modification upon due notice and hearing.

## I. FOOD

Menus at the MCC are organized in 30-day cycles. The meals are prepared in the main kitchen up to a day in advance and refrigerated. At meal times, the trays are sent up to the living units, where they are reheated in microwave ovens.

The meals are nutritionally adequate. In quantity, variety, and palatability, they compare not unfavorably with the food produced in other large institutional kitchens. Respondents, with certain exceptions to be noted below, take suitable pains with this basic aspect of life in or out of confinement.

Petitioners have, however, pressed a list of complaints about food. They assail the cooking and heating procedures; they want meals more wholesome and attractive; they demand more attention to the varieties of individual tastes; and they urge the need for more suitable personnel, including outside civilians to replace some or all of the inmates who work in this aspect of the MCC's operations. Having heard the evidence and observed more than once the preparation and service of meals, the court rejects all of these demands as unfounded both in fact and in law.

One complaint, however, relating to sanitation, will be sustained. Respondents have been notably and persistently lax in allowing inmates to cook and serve



food with luxuriant hair uncovered and bare hands. There is no excuse for this, and respondents offer none. The laxity has been open, notorious, and almost entirely unrelieved. Respondents have arbitrarily and inexcusably neglected their duty in this respect. They will be ordered to make and enforce appropriate regulations.

## J. DISCIPLINE

The amended petition in this case attacked numerous aspects of respondents' disciplinary procedures. Virtually all of these charges were dismissed at the end of petitioners' case-in-chief on the authority of *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The only issues remaining concern the manner in which "administrative detention" is imposed at the MCC and the conditions under which administrative detention and disciplinary segregation are carried out.

1. *Administrative detention.*—Respondents' policies with respect to inmate discipline are set forth in MCC Policy Statement NY7400.5D (4-5-76). The Policy Statement defines "Administrative Detention" as

> "the status of confinement which results in a loss of some privileges which the inmate would have if assigned to the general population. Generally a person placed in Administrative Detention will be locked in his or her own room on the unit where he or she is normally assigned. Persons assigned to open dormitories will have to be transferred from their units to 9-South [the

maximum security unit] when it is determined that Administrative Detention is required." ¶ 11a [49]

The occasions for administrative detention are defined as follows:

> "An inmate may be placed in Administrative Detention when his attitude and conduct indicate that his continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution, and when the inmate:
>
> "(1) Is pending a hearing for violation of institution rules or regulations;
>
> "(2) Is pending an investigation of a violation of institution rules or regulations;
>
> "(3) Is pending investigation or trial for a criminal act;
>
> "(4) Requests admission to Administrative Detention for his own protection or the staff determines that admission to or continuation in Administrative Detention is necessary for the inmate's own protection.
>
> "(5) Is pending transfer or is in holdover status during transfer; or
>
> "(6) Is pending classification or the gathering of information on the nature of an individual's offense, bail and prior record." ¶ 4(a).

[49] "Disciplinary Segregation" is

> "the status of confinement of an inmate housed in an individual cell, either by himself or with other inmates, separated from the general population, as a result of a hearing before the Institution Discipline Committee in which the inmate has been found to have committed a prohibited act. Inmates in Disciplinary Segregation will have significantly fewer privileges than those housed in Administrative Detention * * *." ¶ 11b



The Policy Statement further provides that administrative detention may be ordered "by Correctional Supervisors, shift supervisors, or members of an inmate's unit management team (Unit Manager, Correctional Counselor, Case Manager). The Correctional Supervisor of the Watch must be notified immediately when an inmate is placed in Administrative Detention." ¶ 11(a)(1).

Under Bureau-wide "minimum standards," an inmate charged with misbehavior must be given "a written copy of the charges against him within 24 hours of the infraction," and a hearing must be held within 48 hours (excluding weekends and holidays) of the incident. ¶ 8(a), (b). The unit management team must "formally review the status of each inmate who spends seven (7) continuous days in Administrative Detention and thereafter such cases will be reviewed on the record each week and will be formally reviewed at least every thirty (30) days." ¶ 11(a)(2).

Petitioners charge, and the court finds, that respondents have not complied fully with their own policies concerning the imposition of administrative detention. One inmate was placed in administrative detention (for "malingering") for a period of ten days before a hearing was held, at which hearing he was acquitted of the charge. This same inmate was on another occasion placed in administrative detention pending hearing on a charge of "attempted es-

cape." The hearing did not take place for approximately eight days after the incident (during which period the inmate was locked in), and then the inmate was acquitted.

Another inmate was placed in administrative detention for four days on a charge of possessing a marijuana cigarette, after which he was released without a hearing. Another spent three or four days in detention without a hearing for "unauthorized use of the telephone." The Associate Warden ordered a female inmate locked in because of her "negative attitude" some twelve hours after an incident on the women's unit. She was released four hours later.

At an earlier stage in the case, this court ordered the release of an inmate who had been held for 30 days in administrative detention "for his protection" without his consent.

The instances just reviewed involved disregard of the agency's own standards governing preferment of charges, the grounds for detention in a locked cell, and the appropriate speed for deciding charges on which such detention is predicated. However, the few cases are not enough to constitute a pattern or practice. And the affected individuals are not seeking specific relief for themselves. Nevertheless, it bears repetition that the agency is bound by its own regulations. The court and all affected persons are entitled to expect that those in charge, especially upon notice that violations have occurred, will take suitable measures to enforce compliance. These reminders, the court concludes, are enough on this subject for the time



being. It is to be expected that respondents will scrutinize with care and duly implement their controlling policies limiting administrative detention to cases of genuine necessity, limiting the categories of officials who may impose it, requiring prompt notice of charges, and holding prompt hearings for inmates subjected to this form of harsh treatment.

2. *Exercise during confinement.*—The Policy Statement quoted above sets forth in detail the conditions under which inmates are to be confined either in administrative detention or disciplinary segregation. It says, ¶ 11(a)(3):

> "*Conditions of Administrative Detention.* The basic level of conditions as described below for Disciplinary Segregation will also apply to Administrative Detention. To the extent possible, inmates housed in Administrative Detention will be afforded the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit. Unless there are compelling reasons to the contrary, commissary privileges, reasonable amounts of personal property, and exercise periods exceeding those provided for inmates housed in Disciplinary Segregation will be provided. Visiting and correspondence privileges of the general population will be given inmates in Administrative Detention."

This should mean, *inter alia*, that people in administrative detention will normally have a daily hour of outdoor exercise plus the kinds of physical workouts possible with equipment in the units. On the other hand, inmates in disciplinary segregation are said

to be entitled to at least two one-hour or four half-hour periods of exercise per week. ¶ 11(c)(6).

Despite what is written, the record shows that inmates in administrative detention frequently receive no more, and sometimes have less, exercise time than is required for those in segregation. While this is another case of reminding respondents to do as their own rules require, the reminder is appropriately to be embodied in the decree. For the Policy Statement, like the law more generally controlling, says that only "compelling reasons to the contrary" can justify loss of "existing privileges" for people in administrative detention. It is suitable, therefore, to specify that this parity will be observed unless "compelling reasons," reported to the inmate in writing, are deemed to justify a departure.[50]

3. *Religious observances.*—Inmates in segregation may be denied permission to attend religious services. They are, however, permitted to receive visits from a clergyman of their faith. It is clear that this kind of restriction may lawfully be imposed in the exercise of "a reasonable judgment" appraising the individual inmate against the security and safety needs of the institution. *LaReau* v. *McDougall*, 473 F.2d 974, 979 (2d Cir. 1972), cert. denied, 414 U.S. 878, 94 S.Ct.

[50] As quoted earlier, ¶ 11(a)(3) is also qualified in stating that equal privileges are to be afforded "[t]o the extent possible * * * [and] as is consistent with existing resources available and the security needs of the unit." For purposes of the court's decree, limitations to be imposed under this language will be treated along with "compelling reasons," that is, they will be given to the inmate in writing.



49, 38 L.Ed.2d 123 (1973). There is no evidence in the record that respondents are administering this discretion in an arbitrary fashion, or, in fact, that they have ever exercised it at all. The petitioners have proved no valid grievance on this subject.

4. *Women's lock-in.*—The women's unit on 5-South of the MCC consists of single rooms which have sinks but no toilets. These rooms were originally designed for people expected to be on work-release, in a kind of "halfway house" status; they were never intended as places for locked detention. The women are not locked in at night, as are the men, and may use the toilets located at the end of each corridor. When a woman is placed in segregation, however, or the entire unit is locked in for some reason, the inmates are dependent upon the guards to check periodically whether any of them need to use the toilet.

The guards are of varying conscientiousness with respect to this duty. Inmates have been locked in for many hours without being released to use the toilet. It appears that sinks have done service as toilet bowls when an extended banging on the door failed to attract a guard. Apart from this kind of unpleasantness, it falls today below an acceptable level of humaneness to confine a prisoner of any sex where he or she must solicit freedom to use a toilet.

The cases in which courts have considered and condemned locked cells without toilet facilities have usually involved generally barbarous conditions (of filth, vermin, cramped quarters, etc.) markedly inferior to those in the MCC. See, e.g., *Wright* v. *Mc-*

*Mann*, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed.2d 141 (1972); *Kimbrough* v. *McNeil*, 523 F.2d 1057 (7th Cir. 1975); *Taylor* v. *Sterrett*, 344 F.Supp. 411 (N.D.Tex. 1972), aff'd in part, rev. in part, 499 F.2d 367 (5th Cir. 1974), cert. denied, 420 U.S. 983, 95 S.Ct. 1414, 43 L.Ed.2d 665, reh. den., 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed. 2d 463 (1975). It is a small and justified step from those decisions, however, to hold unacceptable for locked confinement even an otherwise decent cell that lacks a toilet. This court so holds. For sentenced prisoners, the condition must be barred today as cruel and unusual punishment. For pre-trial detainees, it denies due process. For both, the court's decree will forbid the further use of cells without toilets for lock-ins.

## K. STAFF

Petitioners claim that the staffing patterns at the MCC are constitutionally unacceptable. Specifically, they contend that the institution is understaffed, thereby endangering inmates; and, further, that a "sex blind" policy of staff assignments improperly results in male staff on the women's unit, and vice versa.

1. *Number of guards.*—During the day and evening hours (until midnight), one correctional officer is assigned to each modular living unit on Floors 5, 7, 9, and 11.[51] During the "morning watch" (mid-

[51] The inmates of the honor unit are the cadre who work throughout the building. There is one guard on duty in this unit during the day shift only. Unit 3, protective custody, has one guard on duty 24 hours a day.



night to 8:00 a.m.) one officer is assigned to an entire floor, i.e., two living units. The day and evening officers are responsible for a considerable list of duties in addition to supervising the unit: sick call, visiting, search, meals, and some other activities are among the responsibilities of this officer. Frequently, the officer must leave the unit to escort inmates. Petitioners contend that because of the number of functions this one officer must perform for the 48 inmates on the unit (60 in the dormitory under today's decision reducing the number from 120), he or she is unable to perform any of them efficiently, so that there are long delays in the delivery of service to the inmates and threats to their safety.

From midnight to 8:00 a.m., the single guard must divide his time between the two units on each floor. On all except the women's and honor units, the inmates are locked into their rooms, which have no mechanism for attracting the guard's attention. Therefore, inmates needing the guard—because they are sick, for instance—must pound on the door until the guard hears them.

Respondents argue that the nature of the MCC renders it simpler and safer to guard than the average institution, and that the evidence shows that the "staff has not only fully performed its duties in a professional manner, but has contributed significantly to the relaxed atmosphere of the institution." [52]

[52] Respondents' Post-Trial Memorandum 265.

Courts have not hesitated to require penal institutions to assign and/or hire more staff when it appeared that understaffing endangered the well-being of the inmates. See, e.g., *Jones* v. *Wittenberg*, 330 F. Supp. 707, 715 (N.D.Ohio 1971), aff'd *sub nom. Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972); *Tyler* v. *Pereich*, 74-40-C(2) (E.D.Mo., October 15, 1974); *Incarcerated Men of Allen County* v. *Fair*, Civ. No. C 72-188 (N.D.Ohio, May 23, 1973); *Alberti* v. *Sheriff of Harris County*, 406 F.Supp. 649, 678 (S.D.Tex. 1975); *Miller* v. *Carson*, 401 F.Supp. 835, 895-97 (M.D.Fla. 1975); *Hamilton* v. *Landrieu*, 351 F.Supp. 549, 551-52 (E.D.La. 1972); *Jackson* v. *Hendrick*, 1971 No. 2437 (Pa.Common Pleas, April 7, 1972); *Sandoval* v. *James*, No. C-72-2213 RFP (N.D.Cal., October 3, 1975); *Joiner* v. *Pruitt*, No. 475-166 (Lake Cy. Ind. Sup. Ct., February 21, 1975); *Rhem* v. *Malcolm*, 371 F.Supp. 594, 628 (S.D.N.Y.), modified 507 F.2d 333 (2d Cir. 1974); *Hedrick* v. *Grant*, Civil No. S-76-162 (E.D.Cal., November 13, 1976); *Mitchell* v. *Unteiner*, 421 F.Supp. 886, 901 (N.D.Fla. 1976). It remains clear, however, that the judgments of those who run the prisons carry great weight on questions of this sort, and that a powerful case must be made for substitution of judicial judgment.

In this light, the court is not convinced that the institution should be held to be understaffed. On the day shift, the unit officer is not actually alone; each unit has a staff of three to four persons (unit manager, correctional counselor, caseworker and/or secretary) who are in the living units a good part of the



time. Petitioners have not shown that inmates are in any way jeopardized by the current staffing pattern for the 16 or so hours each day when they are not locked in. There is no evidence of violence, or threats of violence, which could be prevented by additional guards, or for which there is an urgent need to add guards. Cf. *Miller* v. *Carson, supra; Incarcerated Men of Allen County, supra; Sandoval* v. *James, supra.* It might be desirable on the unit, but petitioners have not demonstrated that the existing arrangement falls below a minimum enforceable by the court.

The question concerning the morning watch is closer. Inmate witnesses testified to the difficulty of attracting a guard's attention if one is needed at night. The solid cell doors and the lack of any call system by which guards can be alerted that an inmate needs them corroborate this testimony. While these assertions are not to be discounted, it is also true that no case was shown of any serious hurt or discomfort resulting from delay in raising a guard. The officer patrolling two units at night, when most of the inmates are asleep and locked in, has a relatively short distance to cover and a total of approximately 100 people to attend. The officer is expected to move about through the two units. The trip is not a long one. Unless the guard is asleep or indolent, a charge that has not been made, the tour through both units requires a very few minutes.

Upon the evidence in this record, the court cannot agree that two guards are, by any judicially enforce-

able standard, required for the performance of this assignment.

2. *Assignment by sex.*—Respondents hire and assign correctional personnel without regard to sex. Because of the practice of assigning one correctional officer to a unit, as discussed above, this policy frequently results in having a guard alone on a unit of inmates of the opposite sex. "Such staffing patterns," petitioners assert, "create the danger, recognized by the experts and inmates, of sexual relations, possibly without consent, between staff and inmates" as well as other "unwelcome intrusions" into inmates' privacy.[53]

The National Sheriffs' Association declares as a standard that "[n]o male employee or visitor will enter the female quarters in the jail unless advance notice is given and escort service provided by a female jail supervisor. Where there are women in the jail population a female supervisor is required to be on duty." See National Sheriffs' Association, *A Handbook on Inmates' Legal Rights*, Special Note at 3-4 (1974). *Jail Standards* (1977), proposed by The Nebraska State Bar Association Committee on Correctional Law and Practice, would forbid any "male facility personnel [to] enter [a] female inmate's living area, except in an emergency, without female facility personnel present." § 5-(7) at 75. See the similar provision in Rule 53, United Nations Standard Minimum Rules for the Treatment of Prisoners

[53] Petitioners' Post-Trial Memorandum 426.



(1975). The cited standards enforce strong traditions, certainly familiar to a substantial portion of today's judicial personnel. And there is case law to the same effect. See *Forts* v. *Ward*, 434 F. Supp. 946 (S.D.N.Y. 1977); *Hamilton* v. *Love*, 328 F.Supp. 1182, 1195-96 (E.D.Ark. 1971); *Hamilton* v. *Landrieu*, 351 F.Supp. 549, 551 (E.D.La. 1972); *Obadele* v. *McAdory*, Civ. No. 72J-103(N) (S.D.Miss., June 19, 1973).

The subject lies, however, in a sector of the community's mores where the state of flux is uniquely notable. The value placed upon privacy, as against unwanted intrusions by members of the opposite sex, remains high. But the particular concern for *female* inviolability, and the corresponding neglect of comparable male interests, is already somewhat anachronistic. To be sure, biological and cultural factors continue to make it a fact that violent sexual assaults are almost exclusively forms of male aggression. On the other hand, it was common knowledge long before Catherine the Great, to say nothing of the more recent portrayal by Wertmuller in the film *Seven Beauties*, that females may employ positions of power for sexual exploitation of males. Rational prison management, like other forms of social control, should reckon with such realities.

In the last analysis, however, the overriding facts may well be the phenomena of uncertainty and change. And these counsel a tentative and gingerly approach by the judges. The community's standards are obvi-

ously prime concerns in deciding how to regulate contacts, relationships, and exercises of authority between people of opposite sexes. Judges are not by office or training specially qualified as the regulators.

Moreover, since rules and standards in this area affect selection and assignment of correctional employees, prescriptions in terms of sex confront powerful policies opposed to discriminations in employment based upon sex. Civil Rights Act of 1964, Title VII, 42 U.S.C.A. § 2000e *et seq.*; *Dothard* v. *Rawlinson*, —— U.S. ——, 97 S.Ct. 2748, 53 L.Ed.2d —— (1977).

We approach, then, in a setting of fluid and sometimes conflicting values, petitioners' contention that correctional officers should be people of the same sex as the inmates in the unit. The position is grounded upon some evidence of affronts to privacy. For the most part, the female petitioners are the main complainants in this aspect of the case. They charge, and the court finds, that male guards have been casual about walking into the rooms of female prisoners without allowing time for the occupants to arrange to be fully dressed. While the male officers are expected to knock first, and generally do, they have neglected to wait scrupulously for long enough to make the heralding effective.

Nor has this problem been faced only by female inmates. A male inmate testified to a female officer looking in on him while he was on the toilet. And during one of the court's tours, a female guard matter-of-factly led us, without warning the occupants, into a men's washroom and toilet facility. No consternation ensued. It is not possible, at any rate, to find out from a record otherwise bare on this score how common invasions of this type may have been.



There is no evidence at all on the present record of sexual abuse of inmates by correctional personnel. The court cannot proceed in this aspect on rumors or on judicial notice. If we did, we could scarcely emerge from the maze to which the topic leads. After all, the main literature and experience of sexual assaults in prison does not treat of heterosexual misbehavior. Were assault the main concern, having guards and prisoners of the same sex would not solve the problem.

Upon the evidence in this case, and upon the pertinent grounds of judgment and the judicial limitations suggested above, the court deems this a matter for minimal relief. Whatever different views may evolve as matters of social and legislative policy, there are no sufficient grounds for the broad commands petitioners seek. The court will not order the segregation of correctional personnel to match the sexes of the inmates. Neither the evidence nor general facts that might be judicially noticed warrant an order so drastic and confining. See *Dothard* v. *Rawlinson, supra*, at —— n.23, 97 S.Ct. 2748; *Sex Segregation of American Prisons*, 82 Yale L.J. 1229, 1241 (1973).

On the other hand, respondents must ensure more effectively than they have that the elemental requirements of inmates' dignity and privacy are observed. Suitable regulations (and the court's decree) must

forbid entry into rooms or bathroom facilities by officers of the opposite sex unless (a) there has been sufficient warning or (b) emergent necessity justifies an exception. Suitable discipline—preferably by respondents, but by the court if necessary—will attend violations of these rules.

While the court should and will order no more at this time, the question must be deemed an open one as facts and attitudes continue to shift over time. If today's very limited directions prove insufficient to assure simple decency, a closer approach to petitioners' view may come to be required. On this, as on other topics, however, it is to be hoped that flexible adaptations by the people with day-to-day power and responsibility will limit or obviate further interventions by the court.

## I. ADMISSIONS AND TRANSFERS

1. *Admissions.*—All inmates entering or leaving the MCC are processed in the receiving and Discharge Unit ("R&D"). An inmate first assigned to the institution for confinement has his or her own clothing taken away (a practice to be modified under today's decision) and is given a uniform. The street clothes are kept in R&D and are reisused for visits outside the institution, with the process being reversed on return.

Petitioners complain that the delays upon processing on a first admission to the MCC are excessive, and that this is such a grievous default in the critical



time of initial confinement as to require correction by the court. The evidence on this subject is not persuasive that there are delays so unreasonably long as to justify the court's intervention.

2. *Court visits.*—There are further complaints concerning delays in the short journey required from the MCC to this courthouse as well as other courts in the area for which MCC is a place of confinement. It is obvious that long waits in holding pens and similarly unpleasant places, following premature wake-up times and other oppressions, can interfere with an inmate's effective participation in his pending case, and may require judicial correction. *Alberti* v. *Sheriff of Harris County*, 406 F.Supp. 649, 663, 688 (S.D.Tex. 1975); *Dillard* v. *Pitchess*, 399 F.Supp. 1225, 1237 (C.D.Cal. 1975). In the present record, however, the court finds no credible evidence of undue delays reaching the level of constitutional or other wrongs. It is to be hoped and expected that respondents will make best efforts to see that inmates are brought to and from the court with all convenient speed. Particular judges, in the exercise of general powers of supervision and in the administration of their own cases, may find occasions to issue orders on this subject. The record does not support, however, the issuance of any general form of injunctive relief on this subject.

3. *Transfers.*—When this case began, inmates at the MCC awaiting assignment to more permanent places for the service of their sentences were frequently moved with harsh and inconsiderate abrupt-

ness. The practice was to post bus lists for such transfers in the evening preceding an early morning departure. The list was sometimes not posted until after the inmates had been locked into their rooms for the night. In either case, these notifications were so late that it often became impossible for an inmate to notify family, friends, or counsel before precipitate removal to a different institution, often a long distance away.

While this practice was not defensible, it failed somehow to be included in the ambitious list of grievances set forth in the original and amended petitions, and it came to be a subject of debate only during the course of trial. When the undisputed facts were presented, and when the court gave informal intimations of a view adverse to respondents', the latter proceeded to make substantial revisions in their practices. It has now been declared by respondents that notice of a transfer will be given as soon as the designation has been made, and, in all events, at least 24 hours before transfer, except that notice may be withheld from an inmate (a) when there is a reasonable cause to believe that it would present a serious threat to the safety and security of the bus or other means of transportation, (b) when population pressures compel a special, unscheduled bus run or other transfer, or (c) in situations where a present or impending emergency requires immediate transfer.

The revised policy seems adequate. Petitioners insist that if the policy is to be accepted at all, it should, nevertheless, be embodied in an injunction because



it was not evolved until respondents were under the pressure of this lawsuit. Counterbalancing that contention is the tardiness of the submission of this issue. Balancing these equities, and relying on the good faith of the respondents, the court finds sufficient the rectification they have formulated and will make no further orders on this subject.

## M. LANGUAGE

Petitioners charge that the MCC fails to provide adequate information and services for inmates who speak no English; the main emphasis is on inmates who speak or read only Spanish. The complaint in this aspect must fail as a matter of fact and law.

The evidence adduced on this subject was meager in the extreme. Supplementing the record made by the parties, the court ordered a survey of the language situation, during the trial, with particular reference to inmates of Hispanic origin. The survey, if not minutely accurate, serves adequately for its purposes. It showed that of the 521 inmates in the MCC at the time 110 were of Spanish heritage. Of these, 20 spoke no English and 32 read no English. Five of the latter were also illiterate in Spanish.

Although approximately 24% of the MCC staff speaks Spanish, due to staffing patterns and the fact that inmates who do not speak English are not separately classified, non-English speaking inmates may be assigned to units on which none of the staff speaks their native tongue. The MCC handbook,

"Guidelines for Inmates at the New York Metropolitan Correctional Center," is translated into Spanish and distributed to Spanish-speaking inmates, as are some Bureau of Prisons Policy Statements. In addition, since the commencement of this action, the institution has obtained the services of an interpreter to translate these Statements. Although bulletin board notices are occasionally posted in Spanish, it is not the institution's policy to translate such notes in all, or even most, instances.

Although precise figures are not available as to how many inmates are bilingual, the record and the court's knowledge support a finding that the number is substantial. At least for those who speak or read only Spanish, a translator is likely to be available almost all the time from among staff or fellow inmates. The situation is not ideal, to be sure. But it is sufficient to withstand the proposals of petitioners for revisions by the court.

Petitioners ask the court to order that all printed information provided by the prison to inmates or their visitors be translated into Spanish; that 15% of the books in the general library be Spanish; that the institution hire a Spanish-speaking law librarian; that a Spanish-speaking staff member be assigned to any living unit housing Spanish-speaking inmates; and that an interpreter be made available to any arriving inmate who speaks neither Spanish nor English within 24 hours of arrival to explain institution regulations. The interpreter would be required



to visit the inmate at least every 72 hours and be available as problems arose.

The record provides no basis for any of the relief requested. No witness testified to any instance of prejudice, or even discomfort, because of language barriers. The library list shows a number of titles in Spanish; there is no showing as to why, or for whom, they have been insufficient. There is no evidence that Spanish-speaking staff members are not sufficiently available when it is necessary for staff to communicate with Spanish-speaking inmates. Nor is there any evidence of unmanageable difficulties between inmates for want of sufficient communications.

Without intimating that a filing of these gaps in the record might lead to any different result, the court will dismiss the complaints respecting language problems.

## N. GRIEVANCES

Pursuant to Bureau of Prisons Policy Statement No. 2001.6A (10-18-74), the MCC provides procedures for complaints by inmates and responses at ascending levels of the agency. Petitioners assail the prescribed procedures and the practice under them. They seek extensive judicial revisions.

In the first instance, an inmate may present a grievance informally to a member of his unit staff. An informal written complaint, known to all on the inside as a "cop-out," may be sent to the appropriate staff officer. Then, there is a formal written com-

plaint (an "Administrative Remedy Form" or "BP-9"), which requires a response from a staff member within 15 working days. The staff member's determination may be appealed, first to the Regional Office of the Bureau of Prisons, which has 20 working days to reply, and then to the General Counsel of the Bureau, who has 30 working days to reply.

In addition to these procedures, since April 1976, each unit in the MCC has had an inmate committee which meets for the purpose of bringing inmate complaints to the attention of the staff.

Petitioners contend that the stated procedures are constitutionally deficient in that there is no set time in which a staff member must respond to a cop-out (or, in fact, any requirement of an answer at all), and the answer need not be in writing. Should an inmate resort to the formal procedures, the entire process, including appeals, may take 55 working days, or some eleven weeks.

In addition to these difficulties, petitioners note that BP-9 forms are available only from a staff member, who may attempt to discourage the inmate from filing a grievance and propose to solve the problem informally; and it appears that on occasion staff members have in fact refused to give inmates the forms. There are also charges that some staff members have refused to accept BP-9 forms from inmates. Further, a copy of any BP-9 form filed by an inmate is placed in the inmate's central file, and is available to the Parole Commission and other authorities. This, it is argued, will have a chilling



effect on inmates' use of the procedure. Petitioners also challenge the efficacy of the inmate committes. They charge, first, that the committee members are not particularly diligent in soliciting inmate expressions, and, second, that the staff fails to respond to the grievances raised at the meetings.

Building upon the record of expert and other evidence, petitioners seek a substantial catalogue of directives by the court to revise and improve MCC grievance procedures. Specifically, their requests for relief say:

"1. Written grievance procedures

"a. Access to grievance procedure forms should be unrestricted.

"b. All grievance procedure forms describing emergency problems should be answered in writing within 24 hours. All other grievance procedure forms should be answered in writing within three days. All appeals to the regional or national office should be answered in writing within seven days.

"c. No grievance procedure forms or notations as to grievances raised by an inmate should be entered into his central folder or otherwise made available to the parole board or any individual not directly involved in the resolution and response to the grievance.

"2. Elected inmate-staff committees should be established with a right of appeal to an outside individual or group with the power of binding arbitration.

"3. A permanent ombudsman position should be created, with authority to investigate inmate grievances and recommendations, to make suggestions for rule and policy changes, to publicize findings, and to make periodic reports to the Court and/or other interested persons.

"4. Inmates should be advised in advance of all proposed new rules and policies or changes in existing rules or policies and afforded an opportunity to comment on those proposals." [54]

If judgments of policy were for the court, we might institute some or all of the changes petitioners demand. But the court is compelled to conclude that there is neither constitutional nor statutory basis for any of these proposals. However desirable, a grievance procedure is not compulsory for prisons any more than it is in public school faculties, the staff of government agencies, or a host of other places where such devices have been installed. In the rapidly developing field of prison law and policy, the usually forward-looking federal establishment may move soon to follow examples petitioners cite. The court lacks power, however, to compel or accelerate movement of that nature.

There are suggestions in the record that the Bureau's own regulations have been disregarded by MCC personnel in the handling of grievances. But the evidence does not establish any pattern or practice of this nature. And there is no specific case now presented for relief on this score. Obviously, today's decision leaves open individual or even class claims that at some future time violations of applicable regulations are resulting in legal injury to the inmates.

[54] Id. 445.



In this case, however, the prayers with respect to grievance procedures must and will be denied.

## O. SANITATION

Under this heading in their lengthy list of complaints, petitioners begin their Post-Trial Memorandum as follows:

> "The record establishes that the food storage, kitchen, and housing and housing areas of MCC are, and have been, infested with vermin." [55]

The assertions on this subject go on to charge that the facility is heavily populated with mice, lice, and other non-humans. It is charged that the place is strewn with food and garbage; that cleaning utensils are frequently missing; that there is a constant lack of toilet paper and paper towels; that new inmates are given dirty blankets and mattresses on arrival; that washing machines are constantly in disrepair; and that there are other, similar outrages.

This is one among several subjects upon which petitioners have allowed themselves to be carried away. The court rejects their allegations as sub-

[55] Id. 171.

stantially without basis in the record. From repeated visits to the MCC and entirely credible testimony, the court finds that the responsible officials in charge and the entire staff of MCC are earnestly and successfully coping with the problems of keeping the institution clean and orderly. It is impossible, as everyone knows, to walk through a public building so densely populated without finding some litter and some objects where they do not belong. On the whole, however, it is clear that the MCC has a highly satisfactory program for maintaining cleanliness and good order, employing both the energies of paid staff and inmates to this vital end.

In sum, without tarrying further over the details, the complaints about sanitation will be dismissed in their entirety.[56]

## P. VENTILATION AND TEMPERATURE

Since the MCC opened, there have been significant difficulties with the environmental control system. There is no dispute as to this. It is also undisputed that respondents have sought, and expended substantial amounts of federal funds, to remedy the problems. The system now appears to be operating in a reasonably satisfactory fashion.

---

[56] In the multiplicity of our headings and subheadings, the divisions of substantive topics may sometimes be arbitrary and capricious. Under another heading, "Food," the court is ordering measures relating to "Sanitation"—namely, the wearing of gloves and headgear by persons handling food.



Petitioners would have the respondents hire a contractor to inspect and make recommendations concerning the system. The court is not called upon to say whether this is a good idea. Suffice it to say there is no ground for ordering such action.

## Q. FURLOUGHS AND JOB INTERVIEWS

Under this heading petitioners complain of practices and omissions which are clearly within the sound discretion of respondent officials.

It is urged that prisoners here on writs, who might have been eligible for furloughs under the standards of the prisons whence they came, are not suitably classified so that they may have furloughs here. But furloughs are surely among the subjects most broadly confided to the judgments of prison officials. Furloughs for writ prisoners, brought here for special and limited purposes, would appear to present particular difficulties and anomalies. The short of the matter is that petitioners have adduced no significant evidence on this subject and have shown no legal basis for any relief.

Equally unsubstantial is the complaint about MCC's reservation and occupational exercise of the power to verify with a prospective employer the fact that a job interview has been scheduled for an inmate seeking a furlough for that purpose. Petitioners are correct, of course, in asserting that prospective employers may have their interest chilled by confirmatory calls of this nature. The record reveals, how-

ever, and the court's experience with this subject reflects, that the prison, parole, and probation personnel, habituated to collaborative efforts on this delicate problem, proceed with a good measure of care and circumspection. The residual power to make a direct check with the employer is a valid incident to respondents' duties. There is no justification for the proposed intrusion by the court.

## R. MEDICAL CARE—AN UNRESOLVED ISSUE

Despite the length of this decision and the large number of subjects covered, the case is incomplete in one respect. Petitioners have urged that medical care at the MCC is seriously inadequate. With the concurrence and cooperation of both sides, a medical panel was appointed to study this situation. The panel report was received later than had been expected—or, at least, hoped. Thereafter, unsuccessful efforts were made to resolve the medical issues by agreement. For these and other reasons, the record is incomplete on these issues. It has been agreed and arranged that the gap will be filled in an evidentiary hearing before a Magistrate, sitting as special master.[57]

In the meantime, the case has been pending for a long time, all questions other than those concerning

[57] In visits to the MCC, the court toured and considered the medical and dental facilities, receiving some pertinent information from professional and other personnel. The enlightenment thus acquired may serve, of course, to supplement the Magistrate's report.



medical care are ripe now for decision at this level, and there is a substantial likelihood that one or both sides will wish to appeal the many rulings now ready for review. There is no just reason to delay further either the entry of a final decree here or the beginning of appellate efforts.

Accordingly, counsel for petitioners will serve and file a proposed form of final decree. Respondents will serve and file objections to the proposed form and counter-proposals to substitute for the portions deemed objectionable. These submissions and the court's final decree will be completed with all reasonable speed.

APPENDIX G

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 75 Civ. 6000

UNITED STATES OF AMERICA ex rel.
LOUIS R. WOLFISH et al., RELATORS

*v.*

UNITED STATES OF AMERICA et al., RESPONDENTS

Jan. 5, 1977

OPINION

FRANKEL, District Judge.

Originally brought by a prisoner, who was transferred long ago but whose name still begins the caption, this action assails a number of conditions in the Federal Metropolitan Correctional Center ("MCC") adjoining this Courthouse. The Federal Defender Services Unit, assigned by the court to represent petitioner class,[1] has pursued an extensive course of discovery, motions for preliminary injunction,[2] and other

[1] An order dated December 2, 1975, certified that the suit could be maintained as a class action pursuant to Fed.R. Civ. P. 23(b)(1) and (2). See *United States ex rel. Wolfish* v. *Levi*, 406 F.Supp. 1243 (S.D.N.Y. 1976).

[2] The court, in preliminary injunctions, has forbidden the narrowing of visiting privileges and a sharp curtailment of access to telephones, both changes having been made or attempted during the pendency of the case.



preparations for a trial which should begin within the next couple of months. In the meantime, claiming some issues are now ready for decision in their favor, petitioners have moved for partial summary judgment. Respondents have made a cross-motion urging that they should have summary judgment now dismissing most of the claims pressed in relators' motion; as to other matters, respondents urge that there are issues of fact requiring a trial. The motions before the court are described and decided as follows; most of the discussion dealing with matters found ripe for decision today, but noting along the way issues postponed for trial.

I.

Designed and billed as a kind of modern showplace among jail facilities when it opened on August 2, 1975, the MCC contains some dormitory accommodations, but was designed mainly to house prisoners in a total of 389 rooms. The overall structure is 12 stories tall. Each floor designed to house prisoners has one or two largely self-contained units of dormitory or room facilities. Within each unit composed of rooms, there are groups of two to six "clusters" (a cluster being a corridor flanked by two rows of rooms), each containing five to eight rooms. The clusters or corridors open onto two-story "multipurpose" or common rooms. The multipurpose areas typically contain chairs, couches, pay telephones, television sets, eating tables, work tables, mail boxes,

exercise apparatus, typewriters, laundry facilities, ping pong and pool tables, and water fountains.

Some of the housing units also have pantries equipped with microwave ovens, drink dispensers, refrigerators, coffee urns, and ice machines. In addition to a toilet and washbasin in each room, there is one shower for each cluster and, on certain floors, additional toilet facilities.

Each housing unit has a visiting room with tables, chairs, couches, and bathroom facilities, and an education area with blackboards and bulletin boards. There is a rooftop recreation area with basketball, volleyball, and handball courts, and gym equipment.

Though built primarily as a pretrial detention center, the MCC also houses state prisoners and others in protective custody, post-conviction sentenced inmates, and youthful offenders. These "non-pretrial" inmates may comprise, on a daily basis, between 40 and 60% of the population.[3]

A major point on which petitioners now seek summary judgment is their complaint against the housing of two people in rooms said to have been inte ed for single occupancy. Respondents say triable issues of fact preclude decision now on this problem. The court has reviewed the extensive papers and exhibits

---

[3] Petitioners contest the manner in which respondents classify inmates as "pretrial" or "sentenced." The debate concerns those inmates who are serving state sentences but are currently in MCC awaiting trial on federal charges. Petitioners would class these inmates as "pretrial," respondents as "sentenced." Respondents' version has been taken for present purposes.



addressed to this subject. In addition, while there has been no formal trial, the court has adopted respondents' suggestion and visited the MCC, with counsel for both sides, for the particular purpose of considering the physical facts of double celling. The result is that there appear to be no genuine issues as to facts fairly to be deemed material. The court concludes that petitioners are correct.

It is not disputed that each of the 389 rooms was, in respondents' word, "designated" for occupancy by a single inmate when the MCC first opened. In late November, 1975, however, as the population consigned to the MCC grew at a rate evidently unanticipated at the opening so short a time before, it was decided that some rooms would be used to house two prisoners each. As of the time of this decision, 121 of the rooms have now been "designated" for two inmates.

There are two basic categories of these double-occupancy rooms. By far the larger group—some 100 in all—are rooms with total floor space of 75 to 77 square feet. Each of these contains a double bunkbed (with one or two drawers placed on the floor under the lower bunk), a three-drawer desk, one (or sometimes, two) chairs, a shelf for toilet articles (approximately 2′ x 4″), a wash basin, an uncovered toilet, an extension lamp, and a three-foot book shelf (missing from many of the rooms during the court's visit while wall repairs are being completed). There is no place to hang clothing. The narrow aisle running the length of these rooms provides some 30 to 35 square feet of floor space available to be walked on.

The second category of rooms now used for double occupancy is a group of 21 in a so called honor unit; these are considerably less cramped and somewhat less disagreeably equipped for purposes of double occupancy. These rooms were originally designed as part of the hospital unit.[4] Those which now house two inmates vary in size from a little less than 115 square feet to almost 123 square feet. Each contains two beds, both resting on the floor on adjoining walls to form a right angle; one fluorescent light over both beds, one incandescent light over a sink and open toilet, and two night stands. There is a shelf, approximately 2′ x 8″, placed on the wall about six feet off the floor. Under the shelf are two large plastic hooks suitable for hanging clothing. The inmates in this unit, the "cadre," are sentenced prisoners assigned to serve their terms at the MCC. They are not locked in their rooms at night, many of them having night work assignments.

Respondents cling zealously to the locution that the rooms in the MCC were originally "designated"—not "designed"—for occupancy by a single person. In this formulation, "designated" is meant evidently to denote a kind of optional, discretionary, changeable classification. A room "designated" to hold one person, the thought seems to run, may as easily be "designated" at some other time to hold two. The thought, it must be said, is not pursued beyond two, though

[4] There is a total of 30 such rooms, nine of which are in fact used as infirmary rooms housing one inmate each.



it might readily be if linguistics were our only or primary concern.

The decisive reality, however, not seriously open to debate, is that the rooms were *designed* and built to hold a single person, not more. The conclusion is compelled by an array of undisputed facts. To begin with, petitioners invoke the high authority of the architect who designed the MCC and who, in sworn testimony recorded in this court, has described a room like the ones he drew, housing one inmate, as a "very basic planning principle." Contrasting dormitories with rooms, he went on to say:

> "Dormitories are a much more flexible kind of a thing, you see. That is the only real area in that particular facility. One of the reasons why there's been a tendency to go to single rooms is because it's a very clear and apparent violation of capacity when you try to put two people in a room. You can't put one and a third persons in a room. You can always up the population of a space, in which you put people in, and you can through more imaginative planning get better utilization of the space but there is an absoluteness of a room which is designed for one person, and to try to convert it into a two-person room, it's a clear violation of the capability of that space. There is no question there. There is more than enough, you know, objections to double-celling." [5]

[5] The quoted testimony is from a record made in this court in *Ambrose* v. *Malcolm*, D.C., 414 F.Supp. 485 (1976), involving a state facility. Respondents assail petitioners' reliance

It is not necessary by any means to rely solely on what the architect *said*; the plain visual evidence of what he did demonstrates that the rooms he designed were for one inmate, not two or more. There is no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet. There is one shelf for toiletries and one for other things, neither adequate for two people. In the larger group of 100 double-celled rooms there is no place to hang a garment. The double-decker bunks by which these rooms have been changed from singles are so constructed that air from a vent, cold during our winter visit, blows out onto the upper bed a foot or so above body level. Many of the prisoners have blocked the

---

upon the testimony, generating a fair flurry of learned debate about admissibility of testimony taken in unrelated judicial proceedings and not cross-examined by the parties here, privity of parties, certified copies, Rule 56, Fed.R.Civ.P., and similar specialties. The short of the matter is, however, that the quoted testimony of the architect, Mr. Paul Silver, is patently reliable and not genuinely questioned at all. Respondents, for all the affidavits on file, nowhere suggest any other or different or qualified account they might pit against Mr. Silver's. It pushes dubious technicalities too far to urge that the court must ignore such sworn, tested materials in its own files on a motion for summary judgment—an occasion when an affiant, never cross-examined, may establish a fact to which he swears in writing. Rule 56(c). Fed.R.Civ.P. The time is passed when facts effectively known to a court and not meaningfully contested must be treated as nonexistent. Cf. *Leary* v. *United States*, 395 U.S. 6, 42 n. 81, 43 n. 89, 50 n. 106, 51 nn. 107 and 111, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1968) [citations to record of pretrial hearing in *United States* v. *Adams*, 293 F.Supp. 776 (S.D.N.Y. 1968), as evidence of facts material to *Leary*].



vents to cope with this architecturally unintended unpleasantness. And, as a result the rooms are musty and unpleasant smelling. The single beds originally designed for these rooms each had two drawers built under them, mounted on casters for reasonably convenient use. In the reconstruction to house two inmates, it was found necessary to dismantle these caster arrangements; now each "double" room has one of the old drawers lying loose under the lower bed or none at all for the two assigned occupants.

As the units of formerly single rooms are doubled in occupancy, the multipurpose area for each overall unit displays oppressive consequences. Designed for use by the allotted number of single room occupants, the multipurpose rooms become congested, noisy, unworkable for their intended uses. The recreational equipment, never excessive, is less sufficient. The eating tables are, obviously, less adequate. There is more pressure to eat in the cell, with its single chair, open toilet, and unselected companion.

Taking all the facts together, the court concludes that this case is controlled by the principles of *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975), and a growing list of decisions condemning double celling as unconstitutional. See also *Benjamin* v. *Malcolm*, 75 Civ. 3073 (S.D.N.Y. May 10, 1976); *Ambrose* v. *Malcolm*, 414 F.Supp. 485, (S.D.N.Y. 1976); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676 (D.Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), cert. denied, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974);

*Wayne County Jail Inmates* v. *Wayne County Bd. of Comm'rs*, Civ. Action No. 173217 (Cir. Ct. Wayne, Co., Mich. July 28, 1972, and May 25, 1971), aff'd and remanded 391 Mich. 359, 216 N.W.2d 910 (1974); *Commonwealth ex rel. Bryant* v. *Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971). There are, of course, factual differences among the cases. The larger group of rooms involved here, the ones with 75 to 77 square feet, are substantially more spacious than those in *Detainees*, though smaller, it appears, than those in *Inmates of Suffolk County Jail* v. *Eisenstadt*, *supra* (88 square feet). The inmates in the MCC (except for the small cadre of sentenced prisoners who, perhaps oddly, have more freedom than those awaiting trial) are confined to their rooms for shorter periods, some 7½ hours or so daily plus periods of head counts, as against the 14 to 16 daily hours in *Detainees*, though the impact on multipurpose rooms in this case diminishes the difference.[6] The average length of incarceration at the MCC (varying by category of inmate) is between 23 and 65 days, while that in *Detainees* was 16 weeks. The MCC is a far more modern and better decorated building than that involved in *Detainees*. The cells in MCC have doors

[6] An inmate in the MCC is substantially confined to his unit—his room plus his share of the multipurpose room. There is no yard for recreation. There is a rooftop gymnasium of sorts, usable for eight to ten hours a week by each inmate. There is no indoor gymnasium or weight room, no reading room, central dining facility, auditorium, or chapel. Except for members of the cadre, inmates may only leave their modular units when escorted by an MCC officer.



instead of bars, and the common areas are carpeted. All of the residential rooms (with the exception of four cells in the protective custody unit) have an exterior exposure with a window. The comparisons do not uniformly favor the MCC. The jail involved in *Detainees* featured "a gymnasium, a theater auditorium and an enclosed roof recreation area" in addition to "a large variety of activities and programs" (520 F.2d at 396), contrasting notably with the dreary emptiness of the days in the MCC. All in all, however, the federal facility looks better, at least to an outsider.

Emphasizing the relative superiority of the MCC, and warming to the point of comparisons with college dormitories and similar residences, the Warden of the MCC says: "The rooms can accomodate [*sic*] two prisoners comfortably." Moreover, he presents the expertise of a psychiatrist, Dr. Walter William Menninger, who cites a period of service with the Bureau of Prisons and says, after visiting the MCC and reading some of the papers:

> "Based upon my personal observations of conditions at the MCC, my review of the materials described in paragraph 2 above, and my experience in the field of psychiatry, particularly psychiatry as it relates to detention and correctional settings, it is my opinion that "double-bunking" as practiced at the MCC should not have any significant detrimental effects on the physical or psychological health of the inmates at that institution. Some important factors which prompt me to reach this conclusion are

(a) the architectural design and finish of the residential rooms and common areas which convey a non-penal atmosphere and a sense of openness; and (b) the limited period of confinement of any given inmate to the room itself, both in terms of time each day (locked in only for sleeping hours and two court periods), and length of stay (majority of pre-trial inmates are in the MCC 20 days or less). Although the area of some of the residential rooms used for double-bunking may not be ideal, I have not seen any evidence that the "double-celling" practice at the MCC has caused any untoward effects on individual inmates. It does not appear to be psychologically destructive or an unacceptable deprivation of privacy; and there is no evidence it has prompted any increase of deviant sexual or aggressive impulses or tendencies."

There is, as everyone knows, a good deal of contrary expert opinion about the physical and psychological effects of confining two prisoners in one room or cell. See, e.g., *Detainees, supra*, 520 F.2d at 396. With all respect to Dr. Menninger,[7] as well as his fellow professionals in disagreement with him,[8] the

[7] Cf. the possibly distinguishable paragraphs in K. Menninger, *The Crime of Punishment*, at 38-40 (1966).

[8] It scarcely requires a psychiatrist to say it, but our attention has been directed to the testimony of Dr. Augustus F. Kinzel, given before the revered Judge Judd, marking the "humiliation of being locked in with another person, who you * * * may or may not [want] * * * to be locked in with, having to defecate and urinate in his presence * * *." *Volpano* v. *McGrath*, 70 C. 1390, testimony of January 23, 1974 (Tr. 24). Dr. Kinzel went on to describe the tendencies of such



court finds this issue controlled finally by juridical and human criteria that quite transcend the psychiatric debate.

The grounds on which authoritative penological groups and agencies have universally condemned double celling are vividly present here. See *Detainees*, 520 F.2d at 396. The open toilet, at mealtimes and in the middle of the night, remains a stark centerpiece. The fundamental denials of decency, privacy, personal security, and, simply, civilized humanity are all in essence the same when two people are thrown into single prison cells like these. The qualities of threat, nausea, and degradation are visible and palpable for any observer. Given the evolving legal standards of minimum decency defined in cases cited above, the judgment of a lay judge must control the conflicting views of psychiatrists and psychologists, no matter how the opinions are added or multiplied. A court is not required, after all, to litigate over and over again general propositions about matters of human experience that are either self evident or readily demonstrable once for all. We do not take evidence repeatedly that members of the species, often enough to serve as universals, respond unhappily to foul odors, social stigma, humiliation, and denials of minimal privacy. So, here, he who walks slowly and observes can read the uncontradicted evidence of circumstances that the law has now come to de-

confinement to cause alienation, increased suspicion, withdrawal, feelings of helplessness and despair, and forced or traumatic acts of homosexuality. Id. 26-31.

nounce as less than the constitutional minimum for the confinement of fellow human beings.

This conclusion applies to both categories of single rooms involved in this case. The 21 larger rooms in the honor unit (reserved for convicts, not for presumptively innocent detainees) are, to be sure, less blatantly offensive. Nevertheless, each was plainly and unmodifiably designed for one inmate, not two. It remains possible, if extremely unlikely, that single prison rooms somewhere will display "sufficient size and * * * sufficient accommodations to permit double celling without deprivation of a detainee's rights." *Detainees*, *supra*, at 398. As a practical matter, prison authorities, before reaching any such condition, would presumably move (or return) to the use of dormitories, with their greater flexibility and separate toilet facilities. But it is not the court's business to travel very far on such conjectural paths. It is enough to hold, and this court does, that the rooms before us do not rise to the level of possible acceptability for double occupancy.

Respondents stress the thought that the MCC houses sentenced prisoners and inmates from other places brought here on writs as well as pretrial detainees. It is suggested that the conditions in this facility, if unacceptable for detainees presumed to be innocent, may do for those serving terms after conviction. The argument has an air of perverse unreality on the undisputed facts; the only double-bunked rooms at the MCC are being used now for pretrial detainees, and, in one unit, some cooperating witnesses held in protective custody, while the greater privacy and security of single occupancy are enjoyed by sentenced prisoners. Apart from that oddity, and assuming respondents might revise the anomaly, their suggestion is not acceptable. First, the MCC was designed, including its structure of mainly single rooms, for the primary use of pretrial detainees, and that remains its main function. To have an inferior minority of persons housed in ways found unconstitutional for the rest would be a thoroughly deplorable arrangement, fairly to be condemned as cruel and unusual for those affected. There is no indication of how the discrimination would or could be effected without working such an intolerable result. Moreover, it would be sad indeed to have a new and highly publicized federal facility, displayed to the world with supposedly laudable single-room arrangements for presumptively innocent detainees, promptly transformed, at least in part, into a penal slum for persons serving sentences. Having demonstrated in action their judgment that sentences ought not to be served in such conditions, respondents enter quicksand when they seek the court's hypothetical blessing for a possible change of mind and heart.

The federal character of the MCC leads to some further observations of a somewhat preliminary nature which may become more significant as the case proceeds toward a final disposition. Today's condemnation of double celling is amply sustained, in this court's view, by precedents cited above. Most of those precedents relate to *state* jails or prisons. Accidents

of history have caused much of our recent federal jurisprudence governing prison conditions to grow out of cases involving state prisoners. While the pertinent authorities cover this case, it is perhaps permissible to note that the standards we have applied to the states under the Federal Constitution must surely be the barest minimum we can allow for our prisons. In dealing with the latter, our powers (and duties) of supervision may well require more than that minimum. Pressing this notion in concrete terms, petitioners have invoked the Administrative Procedure Act and the specific federal statute defining the obligations of the Bureau of Prisons to "provide suitable quarters" and care, not less than discipline, for federal prisoners, 18 U.S.C. § 402. These may well loom larger as the case progresses. And it may not be wholly irrelevant that the MCC, connected by a third-floor passageway to this building, is a place to which we federal judges consign people who are unable to meet bail conditions that we set.

These thoughts, whether or not they ever become decisive, are to be kept in view as the case progresses. For the moment, the grounds already stated are sufficient to condemn the practice of double celling at the MCC.[9]

---

[9] In a related but separate contention, petitioners seek a prohibition against the occasional placement of mattresses or beds in common areas not designed as sleeping quarters. The extent of such assertedly "emergency" arrangements is not clear. The court is not prepared to rule now on whether they have ever been, or should ever be, justified. The situation may also be affected for the future by the elimination of double celling. The problem is left for resolution after trial.



II.

The petitioners assail a Bureau of Prisons rule, applicable at the MCC, which forbids their receipt of books and other written material from anyone on the outside except publishers and book clubs. The rule raises obvious questions of moment under the First Amendment and, in distinguishing between affluent and other inmates, under the due process clause of the Fifth. Recognizing that there are substantial problems, respondents justify the rule as a permissible security device. The attempted justifications are inadequate; the rule must be nullified.

It is said that hard cover books may be used to secrete narcotics and other kinds of contraband. Such concerns—described as "obvious problems of security and administrative responsibility" [10]—comprise the entirety of the supposed grounds for the rule. With no record of untoward experience at places like the MCC, and with no history of resort to less restrictive measures, respondents' invocation of security cannot avail with respect to the high constitutional interests here at stake. It is evident that the enormous amount of literature published in paper or soft covers does not present the danger respondents cite. Yet their rule makes no pertinent discriminations whatsoever.

---

[10] Memorandum in Opposition to Motion for Partial Summary Judgment 49.

It is also obvious that the variety of persons confined in the MCC—frequently people who appear to have had no connection with narcotics at all—are a population for whom more selective measures would avail.

Respondents' description of the relatively large MCC library is no ground for validating a restriction against people who may want to read all manner of things not present in that library.

There is a very considerable array of authority outlawing rules like the one now in question. This court follows that body of precedent. *Cruz* v. *Hauck*, 515 F.2d 322, 333 (5th Cir. 1975); *Cruz* v. *Hauck*, 475 F.2d 475, 477 (5th Cir. 1973); *Manicone* v. *Cleary*, 74 Civ. 575 (E.D.N.Y., June 30, 1975); *Detainees of Queens House of Detention* v. *Malcolm*, 73 Civ. 1364 (E.D.N.Y., June 29, 1975) (summary judgment without opinion); *Funches* v. *Malcolm*, 73 Civ. 572 (E.D.N.Y., July 12, 1974); *Rhem* v. *Malcolm*, 371 F.Supp. 594 (S.D.N.Y. 1974); *Collins* v. *Schoonfield*, 344 F.Supp. 257, 281 (D.Md. 1972); *Inmates of Milwaukee County Jail* v. *Peterson*, 353 F.Supp. 1157, 1168-1169 (E.D.Wis. 1973); *Marion County Jail Inmates* v. *Broderick*, 74 Civ. 434 (S.D. Ind., April 12, 1976) (no "books, magazines, or newspapers from any source"); *Cooper* v. *Morin*, Index 1411, 174 (Sup. Ct., Monroe Cy., N.Y., March 21, 1975); *Inmates of Allen County Jail* v. *Bender*, Civ. No. 71 F 32 (N.D.Ind., May 19, 1975) (consent decree); *Lambert* v. *Skidmore*, Case No. C 2 74-135 (S.D.Ohio, June 16, 1975) (consent decree). See also,



*Seale* v. *Manson*, 326 F.Supp. 1375, 1381-82 (D.Conn. 1971) ("Absolutely no reading material * * * accepted from outside personal parties." Approved magazines from publisher allowed.).

One recent decision, *Woods* v. *Daggett*, 541 F.2d 237 (10th Cir. 1976), is invoked by respondents for their contrary view. That case involved the Leavenworth Penitentiary. In upholding the "publishers only" rule, the court emphasized and re-emphasized that it was dealing with a "maximum security institution containing many dangerous inmates" where there had been a history of "bizarre efforts to carry contraband," including "cards which were found to contain hacksaw blades and drugs concealed within * * * thick paper * * *." *Id.* at 240. The quoted observations would appear to make the cited case distinguishable. It may be noted, however, that contemporary devices for detecting concealed things like hacksaw blades may still make it unnecessary to have so sweeping a ban on materials protected by the First Amendment. In any event, this court concludes that *Woods* v. *Daggett*, which is, of course, not controlling in this Circuit, requires no result different from that being reached today.[11]

---

[11] A somewhat similar problem, but lacking in First Amendment concerns, is a rather sweeping prohibition against receipt of foodstuffs and other items. The asserted grounds for this restriction are not impressive. Nevertheless, there is enough in the professed fears of contraband and infection to stay the court's hand until the subject has been explored at trial. Still more sensitive issues are raised concerning allegedly inadequate library facilities and access to printed news

## III.

The rooms in the MCC are searched from time to time for varieties of contraband. The petition raises some broad questions about the search procedures and the destruction of alleged contraband seized from the rooms. In their motion for summary judgment, petitioners seek two rulings at this time:

(1) That they should be permitted to observe while their rooms are being searched.

(2) That they should be given receipts for things taken.

The second demand, though vigorously resisted, will be granted now. The first, along with other, broader contentions, must await a fuller factual record for its resolution.[12]

Against the demand for receipts respondents initially made a swift and slightly chilling argument. They said:

---

media. Again, however, the court concludes that the nature of the injury, the extent of the deprivation, and the relative burdens petitioners would impose upon the Government are topics requiring a fuller airing than the motion papers provide.

[12] For the right to observe searches petitioners cite Judge Lasker, surely a leading authority in this field, in *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 844-45 (S.D.N.Y. 1975). The cited decision, however, went explicitly on the record of evidence in the case. Respondents here raise arguments of security, search tactics, and administrative necessities requiring a fuller record than we have. On the other hand, respondents' application for summary judgment in their favor is insufficient.



> "Since confiscated contraband is destroyed, except for cash, which is paid into the United States Treasury, * * * it is difficult to see what purpose a receipt would serve, except as a record for disciplinary proceedings. * * * However, that purpose is satisfied by the completion of an incident report in those cases where the contraband is of a sufficiently serious nature to warrant disciplinary proceedings." [13]

When the court called for more enlightenment, respondents expanded on their search and confiscation practices by pointing to regulations which declare, *inter alia*, that:

(1) "Contraband" includes such specified items as narcotics, "[c]urrency, where prohibited," liquor, etc.

(2) "Many other items may be contraband" under a sweeping definition covering anything "not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an appropriate staff member", plus still other things "when found in excessive quantities, or altered from original status."

(3) The searching officer decides what is contraband to be seized.

(4) "Nuisance" contraband may be returned in the discretion of a "Unit Team Member (Unit Manager or Caseworker) or the Chief Correctional Supervisor * * *."

---

[13] Memorandum in Opposition to Motion for Partial Summary Judgment 62.

(5) Things not returned are destroyed, except for currency, which goes to the United States Treasury.

The foregoing account, incomplete but sufficient for the time being, is based on Bureau of Prisons regulations embodied in Policy Statements upon which respondents rely as authority for their procedures. Respondents argue that the authority to issue such regulations is clear enough, and there is no quarrel with that general proposition. But regulations, certainly no less than statutes, are subject to the requirements of due process. The vice in the Government's position is that the procedures in question are as extreme in denying due process as they could possibly be.

Whatever minimal property a jail inmate may possess, and however minimal the rights attending that property may be, nobody doubts today that the prisoner is to be protected against seizures without some rudiments of primitive fairness. It is not necessary, though it seemingly will be before this case ends, to forecast the list of such fundamentals—notice, an opportunity to protest, "some kind of hearing," etc.[14] It is enough for now, ruling only on what is properly here, that respondents must be ordered to give receipts for what is taken in searches of the rooms.[15] It is depressing to hear in this time the

[14] See Friendly, *Some Kind of Hearing,* 123 U.Pa.L.Rev. 1267 (1975); cf. Verkuil, *A Study of Informal Adjudication Procedures,* 43 U.Chi.L.Rev. 739 (1976).

[15] When respondents spelled out their views on the seizure and destruction of "contraband," petitioners, in a reply memorandum, found the position "shocking" and demanded in a phrase "a proscription against such destruction or conversion." Reply Memorandum 25-26. But that is in turn too speedy and unconsidered. It is unlikely the court will proscribe totally the "destruction or conversion" of weapons, liquor, narcotics, and other things. The probable crux of the problem will be one of substantive scope and, more importantly, fair procedure. As we move toward and beyond trial, the parties should be formulating their positions in more specific and particularized terms.



solemn contention that minor correctional officers may seize property in unobserved searches, take it away, and then destroy it (or purport to destroy it) without even telling the possessor what they have taken, leaving no possibility of recourse or question concerning their self-regulated judgments (as to whether they actually took anything, as to whether things they took were contraband, what should be destroyed, what may be returned). Now that the contention has been made, for the first time in this court's knowledge, it merits prompt rejection.

IV.

There are several issues concerning mail to and from petitioners. These are ripe for decision now.

(1) Petitioners complain against the requirement that their letters to the outside be placed unsealed in the mailbox for reading at will by correctional personnel. The asserted justifications for this requirement run a gamut from trivial to ludicrous.

It is said inmates may write about escape plans. The supposed concern is dissipated, however, when respondents acknowledge that petitioners are free to

make uncensored telephone calls and to have personal visits without the overhearing of their conversations.

Inmates might seek to mail molds for keys, or money, or other contraband. The molds can be detected without reading the mail. Money and "other contraband" are risks at most *de minimis* when measured against the gross invasions of privacy entailed in the wholesale reading of the mail.

Finally, if it might better have been omitted, the argument is made that "spot-checking the letters to and from sentenced inmates can be extremely helpful in alerting the staff to problems facing * * * inmates or to other matters which may help in evaluating their progress * * *."[16] There is no suggestion of any respectable evidence for this thought. If there were, it would remain a callous claim to rights of intrusion of an intolerably offensive character, degrading in the extreme to those ostensibly viewed with concern. The notion of reading their mail for "evaluating their progress" is uniquely graceless, moreover, when it is tendered for a group consisting mainly of detainees awaiting trial.

Once more, respondents' position is overwhelmed by a considerable weight of authority. See e.g., *Hamilton* v. *Love*, 358 F.Supp. 338, 346 (E.D.Ark. 1973); *Gates* v. *Collier*, 349 F.Supp. 881, 898 (N.D.Miss. 1972), *aff'd*, 501 F.2d 1291, 1310-1314 (5th Cir. 1974); *Obadele* v. *McAdory*, Civil Action No. 72J-

[16] Memorandum in Opposition to Motion for Partial Summary Judgment 63.



103(N) (S.D.Miss. 1973); *Kinale* v. *Dowe*, Civil Action # 73-374-GT (S.D.Cal., October 29, 1973); *Marion County Jail Inmates* v. *Broderick*, No. Id. 72-C-424 (S.D.Ind., April 2, 1976); *Lambert* v. *Skidmore, Case* No. C 2 74-135 (S.D.Ohio, June 16, 1975) (consent decree); *Inmates of Allen County Jail* v. *Bender*, Civil No. 71 F 32 ¶ 3 (N.D.Ind., May 1975) (consent decree); *Moore* v. *Janing*, Civil No. 72-0-223 ¶ 11 (D.Neb., March 8, 1973) (consent decree). The court will order that petitioners be freed to seal outgoing mail, subject only to (a) inspection by electronic or other devices to detect hidden objects, without opening the letters, and (b) the power to read contents, in the sender's presence, upon a showing of good cause.

(2) A different result is reached on petitioners' claim concerning mail from attorneys and courts. MCC rules allow "legal" mail to be opened to check for contraband, but not to be read, and only in the presence of the inmates. Petitioners are entitled to no more than this; there is no requirement of good cause for such inspection. *Wolff* v. *McDonnell*, 418 U.S. 539, 574-77, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The partial judgment now to be entered will favor respondents in this respect.

(3) Finally, there is the question of incoming mail from persons other than attorneys and legal officials. This is at least as subject to scrutiny as "legal" mail. It is clear, therefore, that this category of mail may be opened to screen out contraband. Moreover, the administrative burden of doing this in the

inmates' presence would be severe beyond the demands of privacy petitioners understandably urge. At the same time, the paper submissions and the court's direct knowledge of the MCC make it plain that there can be no sound reason for allowing correctional personnel routinely to *read* incoming letters. The worry about mailed escape plans, given the physical situation and other means of communication, is a trivial rationalization. The offensive desire to search out personal problems has been sufficiently answered earlier. Nothing substantial supports the invasion by officials of the privacies in letters to people awaiting trial or sentenced to relatively short terms in the secure confines of the MCC.

Balancing the several interests, the court will order that (a) non-legal mail addressed to petitioners at the MCC may be opened and searched for contraband, (b) without probable cause or the recipients' presence, but (c) with the firm understanding, to be enforced with rigor, that the contents are not to be read, except on a showing of good cause, and then only in the recipient inmate's presence. Petitioners question that the last of these directives is meaningful. How, they ask, can they trust the correctional people to refrain from reading the mail? It is naive to doubt that the question is legitimate. Nevertheless, the response must be the kind of naivete required of judges; until or unless the contrary is shown, the presumption of official regularity must remain significant in the apparatus of Government. It is to be expected that those in charge of the MCC will make the most vigor-



ous efforts to enforce the prohibition now ordered, and to impose due sanctions for its violation. If the court's presumptions and expectations prove unfounded, further measures may be necessary. In the meantime, as stated, the adjustment now ordered seems just and appropriate in light of the constitutional principles governing the problem.

## V.

To summarize: Upon the cross motions before the court, petitioners are entitled to a partial decree enjoining (a) double celling, (b) enforcement of the "publishers only" rule, (c) failure to give receipts for seized property, and (d) the practices respecting mail hereinabove found to be invalid. Respondents are entitled to dismissal of the claims as to mail which have been rejected. As to the first item, double celling, some limited but reasonable time should be allowed to complete compliance, though action toward that end should begin immediately. Cf. *Detainees, supra*, 520 F.2d at 394-95. The other rulings are capable of enforcement, and should be enforced, within the next week or 10 days.

Accordingly, petitioners should serve and file a proposed form of decree on or before January 10, 1977. Respondents should respond not later than January 13, indicating any specific objections they may have to petitioners' proposed decree and offering substitute language where there are such objections. Petitioners may reply on or before January 17, 1977, whereupon a decree will be formulated and entered.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 264934 10

Supreme Court, U. S.
FILED
NOV 16 1978
MICHAEL RODAK, JR., CLERK

# APPENDIX

# In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-1829**

GRIFFIN B. BELL, ET AL.,

*Petitioners*

—*v.*—

LOUIS WOLFISH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 23, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

# In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-1829**

---

GRIFFIN B. BELL, ET AL., *Petitioners*

—*v.*—

LOUIS WOLFISH, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## INDEX


| | Page |
|---|---|
| Docket Entries | 1 |
| Respondents' Notice of Motion for Summary Judgment, September 16, 1976 | 5 |
| Respondents' Affidavit in Support of Motion for Summary Judgment, September 16, 1976 | 7 |
| Respondents' Statement Pursuant to Rule 9-G of the General Rules of the Southern District of New York, in Support of Motion for Summary Judgment | 15 |
| Government's Notice of Motion for Pretrial Summary Judgment, October 18, 1976 | 18 |
| Government's Statement of Facts as to which Genuine Issues Exist | 19 |

Page

Government's Affidavit in Opposition to Respondents' Motion for Partial Summary Judgment and in Support of Government's Cross-Motion for Summary Judgment, October 19, 1976 ..... 21

MCC Commissary List ..... 28

Affidavit of William Walter Menninger, M.D., December 27, 1976 ..... 31

Government's Affidavit in Opposition to Respondent's Motion for Partial Summary Judgment, December 29, 1976 ..... 33

Portions of the Trial Proceedings ..... 36

Respondents' Exhibit #11-A ..... 88

Portions of Government's Exhibit #RX-QQQ ..... 89

Portions of Stipulation of Facts ..... 91

Order Granting Certiorari ..... 97

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000

UNITED STATES OF AMERICA,
ex. rel. LOUIS WOLFISH

*v.*

UNITED STATES OF AMERICA et al.

DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 11-28-75 | Filed class action petition for writ of habeas corpus. |
| 12-29-75 | Filed Order that this proceeding is a class action on behalf of all persons detained at the Metropolitan Corr. Center. * * * FRANKEL, J m/n |
| 1-13-76 | Filed relators amended petition. (By order of Judge Frankel). |
| 1-28-76 | Filed Opinion #43799 & Order that the motion for a preliminary injunction is granted. Visiting regulations not less liberal than those in force when this suit began will remain effective until further order of this court. . . . So Ordered, FRANKEL, J nm |
| 10-1-76 | Filed Order re prelim. inj. that Respondents provide, the following telephone services for inmates at the MCC, as indicated. Provisions to remain in effect until further order of this Court or final disposition of this case. . . . FRANKEL, J. n/m & copy sent to Relators. |

| DATE | PROCEEDINGS |
|---|---|

10-20-76 Filed Respondents notice of motion for partial summary judgment pursuant to Rule 56. Ret. 10-27-76.

10-20-76 Filed Respondents Rule 9(g) Statement of facts concerning which they contend there exists a genuine issue.

10-20-76 Filed Respondents Rule 9(g) Statement of facts concerning which they contend there exists no genuine issue.

10-20-76 Filed affidvt of Larry Taylor, Warden at MCC.

1-5-77 Filed affidvt of Larry Taylor, Warden of the Met. Corr. Center, in opposition to petitioner's motion for partial summary judgment.

1-5-77 Filed Opinion #45495 & Order. Petitioners have moved for partial summary judgment, & Respondents have made a cross-motion urging that they should have summary judgment now dismissing most of the claims pressed in relator's motion. For the extensive reasons indicated, petitioners are entitled to a partial decree enjoining, double celling, enforcement of the "publishers only" rule, failure to give receipts for seized property, & the practices respecting mail hereinabove to be found valid. Respondents are entitled to dismissal of the claims as to mail which have been rejected, etc. The other rulings are capable of enforcement, & should be enforced, within the next week or (10) days. Accordingly, petitioners should serve & file a proposed form of decree by 1-10-77. Respondents should respond not later than 1-13-77. Petitioner may reply by 1-17-77, whereupon a decree will be formulated & entered. . . . FRANKEL, J. n./m



| DATE | PROCEEDINGS |
|---|---|

1-19-77 Filed Order that respondents, employees, & successors, & all persons in concert with them are hereby enjoined from confining any member of the petitioner class at (MCC) except under the following conditions as indicated. Single Cell Occupancy, etc., Receipt of books, periodicals & other reading material. Receipts for the seizure of items. Mail. Further Ordered that so much of the amended petition as seeks an order enjoining respondents from opening & inspecting mail from persons other than petitioners attys or the courts, etc. is dismissed with prejudice; and that petitioners' motion for partial summary judgment & respondents' cross-motion for summary judgment are in all other respects denied. . . . FRANKEL, J. n/m

2-8-77 Trial begun & continued.

3-1-77 Trial con't.

3-2-77 Trial con't.

3-3-77 Trial con't.

3-4-77 Trial con't.

3-5-77 Trial con't.

3-8-77 Trial con't.

3-9-77 Trial con't.

3-10-77 Trial con't.

3-11-77 Trial con't.

3-14-77 Trial con't.

3-15-77 Trial con't.

3-16-77 Trial con't.

3-17-77 Trial con't.

3-18-77 Trial con't. Petitioners Rest.

| DATE | PROCEEDINGS |
|---|---|

3-18-77 Filed Respondent's Notice of Appeal from the USCAA from the opinion dtd: 1-5-77 and order dtd: 1-19-77. Mailed copies.

4-6-77 Filed petitioners' Notice of Motion for summary judgment.

4-6-77 Filed petitioners' Statement pursuant to General Rule 9-G S.D.N.Y. in support of motion.

4-6-77 Filed petitioners' reply memorandum in support of their application for partial summary judgment.

4-6-77 Filed Affidavit of Dr. William W. Menniger, sworn to on December 27-76.

8-30-77 Filed Stipulation of facts between parties.

9-15-77 Filed Opinion #46335 . . . . Accordingly, counsel for petitioners will serve and file a proposed form of final decree. Respondents will serve and file objections to the proposed form and counter-proposals to substitute for the portions deemed objectionable. These submissions and the court's final decree will be complete with all reasonable speed. . . . So Ordered. . . . FRANKEL, J. m/n

10-13-77 Filed Partial Judgment . . . ordered that respondents their agents, eyc. all enjoined from confining any members of the petitioner class at the MCC except under the following conditions (see Judgment) . . . Frankel, J. mn Judgment. 10-13-77 clerk

10-21-77 Filed Respondents Notice of Appeal to the USCA 2nd Circuit from the Opinion dated 9-15-77 & the Partial Judgment ent. 10-13-77 except as to the issue of "Exercise during confinement" decided at pp. 101-102 of the opinion & in paragraph 22 of Partial Judgment as amended by Memorandum filed 10-18-77.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MEF)

UNITED STATES ex rel., LOUIS WOLFISH, HELEN ROMERO, CHARMAINE ROBINSON, MARYANNE CALLAHAN, GERALDINE HARKER, FRANCIS WOODS, DANA DYNES, WILLIE S. MCCARTHA, ESTELLA FERNANDEZ, MARGARET RUSSELL, RUTH SMITH, CYNTHIA EDWARDS, BIRCHEL L. CARSON, SHERMAN GREENE, MILDRED SKEETE, MARY JORDAN, DORIS TORRS, CARMEN ESTRADA, JEREMIAH O'SULLIVAN, MAXIMA VIDAL ORTIZ, ANTHONY VICTORY, JANET FALLEY, GORDON HAGEN, GARRY LEE, LINDA SESSIONS, *et al.*, RELATORS

*—against—*

THE HONORABLE EDWARD LEVI, Attorney General of the United States, NORMAN CARLSON, Director of the Federal Bureau of Prisons; and LARRY TAYLOR, Warden of the Metropolitan Correctional Center, *et al.*, RESPONDENTS

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Michael Young, Esq., the Statement Pursuant to Rule 9-G of the General Rules of the Southern District of New York, the memorandum of law in support of Relators' motion for summary judgment, and all the other papers heretofore filed in this proceeding, the undersigned will move this Court on the twenty-seventh day of September, 1976, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure enjoining Respondents from:

(1) double-celling;

(2) requiring Relators to sleep in corridors, balconies or other non-residential areas;

(3) enforcing the "Publisher Only" rule;

violate their rights. This motion for summary judgment is made with regard to the issues of (1) overcrowding which forces double-celling and housing of some Relators in areas such as balconies, corridors, and "multi-purpose" dayroom spaces; (2) forbidding Relators from receiving books, periodicals and newspapers from family and friends; (3) restrictions on the receipt of personal property; (4) inadequate access to legal materials; (5) inadequate access to news sources; (6) refusal to allow relators' to observe searches of their rooms and to receive a receipt for any item confiscated; and (7) interference with Relators' mail.

4. Relators are persons who are confined in the MCC either while awaiting trial, serving sentence, or awaiting shipment to another prison. The law in this Circuit makes clear that they possess basic human rights which may not be unjustifiably abridged. Indeed, any restriction placed upon relators who are incarcerated solely to assure their appearance at trial is unlawful in the absence of a compelling necessity. Yet there is no necessity for the harsh conditions and practices which are imposed upon Relators at MCC and which are the subject of this motion.

5. The admissions contained in Respondents' "Return to Relators" amended petition (Return), in their responses to Relators interrogatories (Interrogatory Response) and in their papers and affidavits reveal that there can be no genuine dispute concerning the facts relevant to the determination of the issues raised by this motion. The accompanying Memorandum of Law demonstrates that upon these undisputed facts, relators are entitled to judgment as a matter of law.

*Overcrowding*

6. Although designed for no more than 449 inmates (Return, ¶ 7), the inmate population has been above that number virtually all of the time since the institution opened, and has on occasion ranged as high as approximately 600 (Return, ¶ 7) (population summary sheets).



7. The residential rooms on Floors 3, 5, 7, 9, and 11 North were designed to house a single person (Return, ¶ 7). Each of these rooms contains approximately 76 square feet.

8. Paul Silver, the architect who designed MCC has stated in sworn testimony:

> Q. Mr. Silver, in your estimation, although you planned the Metropolitan Correctional Center for a certain capacity, would it be possible in fact for that institution to absorb additional people?
>
> * * * *
>
> A. See, there are certain criteria that were brought into the planning principle. For example, the rule that we began with was that for every room we would only provide one—to put one man in a room. I think you have a room that is very, very basic planning principle. That establishes a population capacity.
>
> Dormitories are a much more flexible kind of a thing, you see. That is the only real area in that particular facility. One of the reasons why there's been a tendency to go to single rooms is because it's a very clear and apparent violation of capacity when you try to put two people in a room. You can't put one and a third persons in a room. You can always up the population of a space, in which you put people in, and you can through more imaginative planning get better utilization of the space but there is an absoluteness of a room which is designed for one person, and to try to convert it into a two-person room, it's a clear violation of the capability of that space. There is no question there. There is more than enough, you know, objections to double-celling.
> MR. TOBIAS: Nothing further, your Honor.
> MR. HERMAN: I have nothing further.
> THE COURT: Thank you very much, Mr. Silver.
>
> *Ambrose* v. *Malcolm*, 76 Civ. 190 (S.D.N.Y.), Transcript of Feb. 4, 1976 at 267-8.

9. Overcrowding at MCC has resulted in the imposition upon a fluctuating number of relators of double celling of two persons in rooms which are designed for only one (Return, ¶ 8).

10. At various times since MCC opened, up to and including the present time, numbers of Relators have not even been provided with living space in a residential room of the institution, but rather have been required to sleep on cots, beds, or mattresses placed in corridors and common areas of the various housing units or in the room originally designed for magistrate's proceedings (Return, ¶ 10).

11. The Court of Appeals has determined that such double celling is a dehumanizing practice which constitutes a due process deprivation and which may not be condoned or tolerated (See Relator's Memorandum of Law at 5-12).

*Refusal to Allow Relators to Receive Books, Periodicals, or Newspapers from Family and Friends*

12. Respondens have enforced a "Publishers-Only" rule at MCC which prohibits Relators from receiving literature from any source other than the publisher or "book clubs" (Return, ¶ 72). Family members or friends may not, under this rule, provide Relators any published material either directly or through the mails.

13. The "Publishers-Only" rule is a violation of Relators' First Amendment rights (See Relator's Memorandum of Law at 13-15).

*Restrictions on Receipt of Personal Property*

14. Relators are severly limited in the amount of personal property they may possess. Except on rare occasions such as Christmas and certain Jewish holidays Relators may not receive food stuffs from their family to supplement the daily institutional diet (Return, ¶ 88; Interrogatory Answer No. 111). In addition Relators are not permitted to receive or possess electric shavers or personal typewriters at MCC (return, ¶ 88). Relators



may however, purchase items such as portable radios from the Commissary if they have enough money.

15. MCC has an operational flouroscope and magnetometer which could be used to inspect packages for contraband.

16. The restrictions placed upon the receipt of personal items are unnecessary and unjustified by a compelling necessity (See Relator's Memorandum of Law at 16-17).

17. In April, 1976, MCC possessed a collection of legal books, as set forth in Exhibit A to this affidavit (See Interrogatory Response 88 and Exhibit 86). This collection was substantially in compliance with Federal Bureau of Prisons Policy Statement No. 2001.2B (Set forth as Exhibit B to this affidavit).

18. In September, 1976, MCC possessed a collection of legal books, as set forth in Exhibit C to this affidavit. This collection lacks such basic research tools as the United States Law Week (both the Supreme Court and the General Law sections), the New York Law Journal, Wright's *Federal Practice and Procedure*, Stern and Gressman's *Supreme Court Practice*, Weinstein on *Evidence*, Frankel on *Criminal Sentences*, or a complete set of the Federal Bureau of Prisons Policy Statements. Additionally, it contains no state penal codes, codes of criminal procedure, or case law for any of the states in the Second Circuit or New Jersey, although a significant number of inmates at MCC are under indictment or state sentence from those jurisdictions.

19. MCC has no legal assistance program to aid inmates in the preparation of their legal papers.

20. The collection of legal materials which does exist is located in a storeroom on the second floor of MCC away from the living areas. Relators may not visit this "library" area or conduct research there. Rather, they must submit a request for a particular book to be sent to them (Return, ¶ 63).

21. Relators may only borrow three books from the library at one time (See "Metropolitan Correctional Center, The Law Library" set forth as Exhibit D to this affidavit).

22. Relators are not even provided with a complete list of the books in the law library (Compare Exhibit D with Exhibit C).

23. Denial of personal access to an adequately maintained Law Library deprives Relators of their constitutional right of effective access to court (See Relator's Memorandum of Law at 18-24).

*Restriction on Access to News*

24. When this lawsuit commenced, Relators were given no opportunity to purchase newspapers at MCC (Return, ¶ 73). In June, 1976, certain newspapers became available for purchase in the housing units at MCC.

25. A significant number of Relators incarcerated at MCC are indigent.

26. No free newspapers are available for relators to read, either in the residential units or through the library.

27. News periodicals are not sold at MCC, nor are they made available in the housing units or through the library.

28. This denial of access to concurrent news sources is violative of Relators constitutional right to receive information which can not be justified by any legitimate penological need (See Relators' Memorandum of Law at 25-27).

*Searches*

29. Relators are not permitted to observe regular institutional searches of their rooms (Return, ¶ 85). Moreover, they are not provided with receipt for any items confiscated during searches (Interrogatory Response 106 (b) and (c)).

30. There is no valid security rationale which excuses this invasion of Relator's privacy and the security of their property (See Relator's Memorandum of Law at 28-29).



*Restrictions on Mail*

31. Respondents permit Relators to engage in private conversations with their family and friends during visits and by telephone (Affidavit of Larry Taylor, submitted in response to Relator's motion for Preliminary Injunction, January 19, 1976; Response to Relators' Interrogatory #16). However, all out-going and incoming mail from Relators to and from their family and friends is opened and inspected and sometimes read outside Relators' presence by Respondents (Return, ¶¶ 76, 77).*

32. There is no valid security justification for this infringement upon Relator's and their family's constitutional rights (See Relator's Memorandum of Law at 30-35).

WHEREFORE, Relator's motion for summary judgment should be granted enjoining Respondents from (1) double celling; (2) housing any Relators in other than designated sleeping areas; (3) enforcing the "Publisher Only" rule; (4) restricting the possession of personal property; (5) denying personal access to adequate legal materials; (6) denying adequate access to news sources; (7) preventing Relators from viewing searches of their cells and not providing receipts for

---

* Respondents concede in their Return at ¶ 77 that Relators' incoming and outgoing personal mail "may be spot checked by members of the MCC staff." Bureau of Prisons Policy statement 7300.1A (attached hereto as Exhibit E) authorizes such "spot-checking" and states:

> Spot-checking is defined as a procedure for reviewing or scanning a limited number of all letters received for mailing or for distribution to the inmate body. For example, spot-checking might involve scanning one of every ten or fifteen letters being mailed from or received at the institution. It does not imply that every letter should be scanned. It should be done frequently enough to maintain security, learn about a particular problem confronting the inmate or alert the staff to any matter that may help in evaluating the inmate's progress. (*Id.* at 3)

From this definition, it is clear that "spot-checking" is a euphemism for "reading" certain inmate mail.

confiscated items, and (8) interfering with Relators' mail.

/s/ Michael A. Young
MICHAEL A. YOUNG

Sworn to before me this 16th day of September, 1976

/s/ Phylis Skloot Bamberger
PHYLIS SKLOOT BAMBERGER
Notary Public
State of New York
No. 31-4500431
Qualified in New York County
Commission Expires March 30, 1977



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MEF)

UNITED STATES ex rel., LOUIS WOLFISH, HELEN ROMERO, CHARMAINE ROBINSON, MARYANNE CALLAHAN, GERALDINE HARKER, FRANCIS WOODS, DANA DYNES, WILLIE S. MCCARTHA, ESTELLA FERNANDEZ, MARGARET RUSSELL, RUTH SMITH, CYNTHIA EDWARDS, BIRCHEL L. CARSON, SHERMAN GREENE, MILDRED SKEETE, MARY JORDAN, DORIS TORRS, CARMEN ESTRADA, JEREMIAH O'SULLIVAN, MAXIMA VIDAL ORTIZ, ANTHONY VICTORY, JANET FALLEY, GORDON HAGEN, GARRY LEE, LINDA SESSIONS, *et al.*, RELATORS

*—against—*

THE HONORABLE EDWARD LEVI, Attorney General of the United States, NORMAN CARLSON, Director of the Federal Bureau of Prisons; and LARRY TAYLOR, Warden of the Metropolitan Correctional Center, *et al.*, RESPONDENTS

STATEMENT PURSUANT TO RULE 9-G OF THE GENERAL RULES OF THE SOUTHERN DISTRICT OF NEW YORK

Pursuant to Rule 9-G of the general rules of this Court, Relators submit, by their attorney, Michael A. Young, the following in support of their motion for summary judgment in their favor on the ground that there are no genuine issues of material fact to be tried on the claims mentioned below and Relators are entitled to judgment in their favor as a matter of law.

1. Relators are persons who are confined at the New York Metropolitan Correctional Center (MCC), either while awaiting trial, serving sentence, or awaiting shipment to another prison.

*Overcrowding*

2. Since its opening in August, 1975, overcrowding at MCC has resulted in the double celling of a fluctuating number of Relators by confinement of two Relators in a single residential room designed to house only one person.

3. At various times other Relators have been forced to sleep on cots, beds, or mattresses placed in balconies and other common areas of the facility.

*"Publisher Only" Rule*

4. Relators are prohibited from receiving literature from their family or friends at MCC. The only reading material which they may receive from outside the facility must be sent directly from the publisher or in some cases "book clubs".

*Personal Property*

5. Except on rare occasions at religious holidays Relators may not receive packages or food stuffs from their families or friends.

6. Relators are not permitted to receive or possess electric shavers or personal typewriters.

*Access to Legal Materials*

7. The law library collection at the MCC lacks a variety of federal and state law research materials.

8. The legal collection is located in a store room. Relators may not visit this area to conduct legal research, but rather must submit a written request for a particular book to be sent to them.

*Access to News*

9. Relators are not given daily free access to newspapers and periodicals. Moreover, until May, 1976, Relators could not purchase newspapers in the institution. Relators are still not permitted to purchase news periodicals.



*Searches*

10. Respondents refuse to permit Relators to observe searches of their rooms and personal effects.

11. Relators are not provided receipts for any personal items confiscated during such searches.

*Mail*

12. Relators are permitted to have private conversations with family members and friends during visits and by telephone. Nevertheless, MCC rules permit all incoming and outgoing mail with the exception of mail from attorneys, courts and public officials to be opened, inspected, and occasionally read without cause outside Relators' presence. These rules also permit the opening and inspection of mail from attorneys and the courts without cause.

/s/ Michael A. Young
MICHAEL A. YOUNG
PHYLIS SKLOOT BAMBERGER
Attorneys for Relators
THE FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
United States Court House
Room 509
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL MUSHLIN, ESQ.
*Of Counsel*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MEF)

[Filed U.S. District Court 10-20-76]

UNITED STATES OF AMERICA *ex rel.*,
LOUIS WOLFISH, *et al.*, RELATORS

*v.*

EDWARD LEVI, *et al.*, RESPONDENTS

## NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the Rule 9(g) Statements, affidavits, and memorandum of law submitted herewith, respondents, by their attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, will bring on for hearing on the 27th day of October, 1976, in Room 618, United States Courthouse, Foley Square, New York, New York, at such time as the Court may direct, a motion for an order granting partial summary judgment in favor of respondents pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Dated: New York, New York
October 18, 1976

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Respondents

By: _____
FREDERICK P. SCHAFFER
Assistant United States Attorney
Office and Post Office Address:
U.S. Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Tel. No.: (212) 791-1973

TO: THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
U.S. Courthouse, Room 509
Foley Square
New York, New York 10007



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MEF)

UNITED STATES OF AMERICA *ex rel.*
LOUIS WOLFISH, *et al.*, RELATORS

*—against—*

EDWARD LEVI, *et al.*, RESPONDENTS

## RESPONDENTS' RULE 9(g) STATEMENT OF FACTS CONCERNING WHICH THEY CONTEND THERE EXISTS A GENUINE ISSUE

Pursuant to Rule 9(g) of the General Rules of this Court, the respondents submit that there are genuine issues to be tried as to the following material facts relating to relators' motion for summary judgment dated September 16, 1976:

1. The effect or impact on the physical and mental health and well-being of inmates at the Metropolitan Correctional Center ("MCC") resulting from the double-bunking of some inmates at the MCC.

2. The effect or impact on the physical and mental health and well-being of inmates at the MCC resulting from the temporary confinement of inmates in non-residential areas of the MCC.

3. The duration and frequency of the temporary confinement of inmates in non-residential areas of the MCC.

4. The adequacy of the facilities, accommodations, staff and services at the MCC to meet the needs of the inmates when more than 499 individuals are confined at the MCC.

5. The specific conditions under which inmates have been double-bunked or temporarily confined in non-residential areas of the MCC, including but not limited to the description of residential units at the MCC which is contained in paragraph 1 of Respondents' other 9(g) Statement and incorporated herein by reference.

6. The measures taken by officials at the MCC and Bureau of Prisons to transfer and transport individuals out of the MCC as quickly as possible.

7. The adequacy of the MCC general library.

8. The burden, effect or impact on inmates at the MCC of the publisher only rule.

9. The burden, effect, or impact on inmates at the MCC resulting from their inability to conduct legal research in the law library.

Dated: New York, New York
October 18, 1976

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Respondents

By: /s/ Frederick P. Schaffer
FREDERICK P. SCHAFFER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Tel. No.: (212) 791-1973



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MEF)

[Filed U.S. District Court 10-27-76]

UNITED STATES *ex rel.* WOLFISH, *et al.*, RELATORS

*v.*

EDWARD LEVI, *et al.*, RESPONDENTS

## AFFIDAVIT

STATE OF NEW YORK )
COUNTY OF NEW YORK ) SS.:
SOUTHERN DISTRICT OF NEW YORK )

LARRY TAYLOR, being duly sworn, deposes and says:

1. I am the Warden at the Metropolitan Correctional Center ("MCC") and as such I am a respondent in this action. I am familiar with the matters set forth herein and I submit this affidavit in opposition to relators' motion for partial summary judgment and in support of respondents' cross-motion for summary judgment.

*Double-Bunking and Overcrowding*

2. As set forth in my previous affidavit of December 10, 1975, paragraphs 2 through 7, which was submitted in this action, the MCC has placed double-bunks in some of the residential rooms of the MCC to accommodate an expected rise in the inmate population. The number of double-bunked rooms (excluding the dormitory which has 60 double-bunks or 120 beds) is set forth in paragraph 1 of respondents' Rule 9(g) statement.

3. In addition to installing those double-bunks to meet the expected rise in population, the MCC has taken certain measures in an attempt to reduce the population at the MCC (*See* Return to the Amended Petition, dated February 13, 1976, paragraph 7.) Since approximately May 11, 1976, Bureau of Prisons' buses transporting in-

dividuals between Bureau correctional facilities have been rerouted and diverted from the MCC in order to minimize the instances when the MCC is required to house, either over night or for a few days, such individuals who are in transit. Whereas, previously the Bureau bus was stopping at the MCC approximately twice a week, it now comes to the MCC once per month, except in an emergency situation. At the same time, the Bureau of Prisons assigned a 22-seat bus to the MCC for our use in transporting individuals between the MCC and other Bureau correctional facilities.* The regular schedule for this bus is annexed hereto and made a part hereof as Exhibit "1". In addition, we have now been authorized to make an additional run on either Thursdays or Fridays when needed. The MCC also has a 9-seat van which is used to transport inmates.

4. Individuals going to areas outside of the MCC regular bus route are transported from the MCC through the Prisoner Coordination Unit in the U.S. Marshal's office. The MCC is working with the U.S. Marshal's office to maximize efforts to move prisoners from the MCC as soon as possible after they have been designated to another federal institution, or the writ bringing them to the MCC has been satisfied.

5. It is the MCC policy to assign and designate an inmate for confinement at a particular correctional institution within 1 or 2 days after the MCC receives the inmate's Judgment and Commitment from the sentencing court; the inmate is then transferred from the MCC to the designated facility at the earliest possible time. As part of our effort to speed-up the designations and transfers from the MCC, we have reorganized the Receiving and Discharge Section at the MCC, added a full-time supervisor for that unit and a full-time case management coordinator for faster and more efficient processing and designation.

6. We have also increased the number of our referrals of short term offenders to community treatment

* A new bus to replace the present one is expected to arrive for use beginning in approximately December; this replacement has a capacity of 32 seats.



centers and the Federal Prison Camp at Allenwood, Pennsylvania which has recently increased its capacity. We have attempted to increase our contracts with detention facilities in the surrounding areas to house individuals in federal custody but because of increased populations in those institutions we have been successful.

7. Although these efforts have not been completely successful in permanently reducing the population at the MCC, they have helped to keep the average population well below 600. *See* MCC Daily Population Log Summary for each day since August 2, 1975 (the day the MCC opened) setting forth the population count at the MCC which is annexed hereto as Exhibit "2". Indeed, although we can not accurately predict what our population may increase to, up to this time we have avoided reaching a population count of 620 which was projected last December (Taylor Affidavit, dated December 10, 1975, ¶ 3.)

8. The above-described procedures have also helped us to minimize the number of occasions when it has been necessary to even temporarily confine inmates in common areas. When such an emergency situation occurs, the MCC policy is to first fill all available beds (except in the women's unit and the protective custody unit) and then assign individuals to cots placed in the commons areas; as soon as rooms become vacant, inmates housed in the commons areas are reassigned to such rooms. Particularly within the last four months, on the few occasions when it has been necessary to house individuals in commons areas, that situation has lasted for only approximately 1 or 2 nights. Moreover, except for the evening of October 13, 1976 when six individuals were assigned to mattresses (rather than cots) that situation had not occurred since approximately February 1976. Indeed, the need to resort to such accommodations on October 13, 1976 was due to a rapid increase in the population which we were unable to move out of the MCC because the MCC bus had broken down. That situation lasted for that night only, and thereafter we were able to rapidly reduce the population by having special runs on Friday, October 15, and Saturday, Oc-

tober 16, as well as the regularly scheduled run on Monday, October 18, 1976.

*Publisher Only Rule and Possession of Personal Property*

9. The introduction into the MCC of packages from outside the institution creates serious problems of security and administrative manageability. A careful visual, tactile and perhaps chemical or taste analysis of each package sent to the institution would be necessary in order to prevent the introduction of contraband such as drugs, alcohol, weapons and money, all of which pose a serious threat to the security and good order of the MCC. For some packages, such as hard cover books, it may very well be necessary to damage the package (remove the cover) to make a proper and thorough search; in the case of all books and magazines, it would be necessary to leaf through every page in order to insure that money and other contraband were not inserted between the pages. This search process would take a substantial and inordinate amount of available staff time. Moreover, in the case of food packages, a serious health hazard would be created due to possible spoilage and by attracting insects and vermin. Finally, the maintenance of order and discipline within the MCC demands a limit on the possible inequalities between inmates in terms of the value and amount of personal property they may possess in the MCC so as to avoid jealousies, thefts and fights relating to personal property.

10. Because of these problems, the MCC has adopted the rule whereby an inmate may receive reading material from outside the institution only if it comes directly from the publisher or a book club. In our view, there is relatively little risk that material received directly from a publisher or book club would contain contraband, and therefore, the security problems are significantly reduced without a drastic drain on staff resources. In order to provide inmates with alternate sources of reading material, the MCC maintains a general library, sells newspapers and distributes magazines as more specifically described in the accompanying affidavit of Robert Harris, Education Specialist at the MCC.



11. Further, the MCC prohibits receipt of other types of packages from outside the institution, with the exception of special food packages at Christmas and certain Jewish holidays,* as noted above, this limitation is necessary in light of the problems discussed in paragraph 9 above. Inmates are, however, permitted to purchase a wide variety of personal and prepackaged food items and fruit from the MCC commissary. A copy of the current MCC commissary list is annexed hereto as Exhibit "3". A limit of $15.00 per week, or a total of $45.00 per month, has been placed on purchases by inmates from the commissary (with the exceptions noted on Exhibit "3") in order to minimize the risk of thefts, fights and tension as stated above.

*Access to the Law Library*

12. In addition to space limits in the law library, it would require a substantial amount of additional staff time to escort inmates to the law library and also supervise them during the time that they are conducting legal research. Because of these problems, it has been necessary for the MCC to adopt a system whereby inmates request books from the law library and the books are thereafter brought to them. We believe that this system provides inmates with reasonable access to legal materials.

*Room Searches and Contraband*

13. During a formal unit shakedown, when a particular portion of a residential unit is cleared of inmates and a search conducted, the MCC does not permit an inmate to watch a search of his room; during the less formal searches which are conducted more often, it is also not advisable to have inmates present during searches, although on these less formal shakedowns correctional officers have the discretion to permit the inmate

* For the Jewish Holidays, the food packages are brought in through the Food Service Dept.

to stand at the doorway to his room to observe the search. These rules on searches are necessary for the following security reasons: (a) to be effective, searches must be carried out at random times, when inmates may not be in their residential units; (b) to permit inmates to be present would enable them to discover where particular correctional officers most often conduct their searches; (c) inmates' presence pose the risk of violent confrontation between inmates and correctional officers when the inmate is seeking to conceal contraband; (d) an inmate's presence would also enable him to move contraband while the officer is conducting the search.

14. When contraband is found of a sufficiently serious nature to warrant disciplinary proceedings (*e.g.*, hazardous contraband, or items of more than nominal value) the inmate receives a written incident report which describes the contraband which has been seized. Much of the contraband that is seized is either institution property not authorized for possession by the inmate, or institution property which, although authorized for inmate use, has been altered; money which is seized is paid into the United States Treasury. In instances where nuisance contraband is seized, and does not result in any disciplinary proceeding, the inspecting officer may give the inmate oral notification of what was seized.

*Inmate Mail*

15. The MCC adheres to Bureau of Prison Policy Statement 7300.1A regarding processing of inmate mail. As set forth in paragraph 6b therein, the MCC scans, on a random basis, incoming and outgoing personal mail. This rule is essential to the furtherance of two important interests of the institution unrelated to suppression of expression. First, spot-checking of such mail is necessary to discourage and prevent escape attempts. Although telephone calls and personal visits are not similarly monitored, the possible use of the mails for more detailed communication of escape plans, including maps or diagrams, justifies closer attention to letters than to oral communication. Second, spot-checking letters to and from sentenced inmates can be extremely helpful in alert-



ing the staff to problems facing such inmates or to other matters which may help in evaluating their progress or institutional adjustment, thereby assisting the goal of rehabilitation.

16. The inspection of outgoing personal mail is necessary in order to prevent the sending of money and other contraband, including escape plans, diagrams, key molds, from the MCC. It is particularly important that this inspection be carried on as a regular procedure in order to insure that illicit activities, of which the staff may have no prior knowledge, may effectively be ended at the earliest possible time.

WHEREFORE, it is respectfully requested that relators' motion for partial summary judgment be denied, and respondents' motion for partial summary judgment be granted.

/s/ Larry Taylor
LARRY TAYLOR
Warden, MCC

Sworn before me this the 19th day of October, 1976

/s/ [Illegible]

A—98

METROPOLITAN CORRECTION CENTER

150 PARK ROW
NEW YORK NEW YORK

NAME _____ INMATE NUMBER _____

UNIT NUMBER _____ ROOM LETTER _____ ROOM NUMBER _____

AMOUNT OF PURCHASE _____ BALANCE AFTER SALE _____

| QUANTITY | ITEM | PRICE |
|---|---|---|
| ____ | B & H DELUXE | .45 |
| ____ | PKS B & H 100'S | .35 |
| ____ | PKS PALL MALL | .35 |
| ____ | PKS MARLBORO | .30 |
| ____ | PKS SINSTON | .30 |
| ____ | PKS WINSTON 100'S | .35 |
| ____ | PKS VICEROY | .30 |
| ____ | PKS KENTS | .30 |
| ____ | PKS SALEM | .30 |
| ____ | PKS KOOLS | .30 |
| ____ | PKS APPLE TOBACCO | .45 |
| ____ | PKS CHERRY TOBACCO | .45 |
| ____ | PKS MIXTURE #79 | .45 |
| ____ | PKS PIPE FILTERS | .10 |
| ____ | PKS PIPE CLEANERS | .25 |
| ____ | EA CORN COB PIPE | .45 |
| ____ | EA GARCIA BEGA REGALOS | .20 |
| ____ | EA GARCIA VEGA GALANT | .20 |
| ____ | EA PALMA THROUOUTS | .15 |
| ____ | EA POUND CAKES | 1.05 |
| ____ | EAH COFFEE CAKES | 1.05 |
| ____ | EA FIG NEWTOWNS | .80 |
| ____ | EA LORNA DOONES | .65XXXX |
| ____ | EA MAYFAIR ASST. | .80 |
| ____ | EA CHIP AHOY | .90 |
| ____ | EA CHEESE NIPS | .65 |
| ____ | EA RITZ CRACKERS | .75 |
| ____ | EA GINGER SNAPS | .85 |
| ____ | EA POTATO CHIPS | .45 |
| ____ | EA PRETZELS | .50 |
| ____ | EA FRITO CORN CHIPS | .45 |
| ____ | EA CHEETOS | .55 |
| ____ | EA COCKTAIL NUTS | .65 |
| ____ | EA MIXED NUTS | .85 |
| ____ | EA CASHEW NUTS | 1.15 |
| ____ | EA CHERRY PEPPERS | .60 |
| ____ | EA SLIM JIMS | .20 |
| ____ | EA 3MUSKETEERS | .15 |
| ____ | EA SNICKERS | .15 |
| ____ | EA HERSHEY ALMONDS | .15 |
| ____ | EA MR. GOODBAR | .15 |
| ____ | EA LIFESAVERS | .15 |
| ____ | EA PENNY CANDY | .01 |
| ____ | EA VICTORS COUGH DROPS | .20 |
| ____ | EA BIC PENS | .20 |
| ____ | EA PLASTIC PITCHERS | .70 |
| ____ | EA " MUGS WITH HANDLE | .30 |
| ____ | EA " GLASS TUMBLER | .30 |
| ____ | EA APPLE PIES | .20 |
| ____ | EA CHERRY PIES | .20 |

| QUANTITY | ITEM | PRICE |
|---|---|---|
| ____ | EA TANG - ORANGE | 2.20 |
| ____ | EA GRAPEFRUIT | 1.20 |
| ____ | EA SHASTA | .20 |
| ____ | A - CREME | |
| ____ | B - ROOT BEER | |
| | C - BLACK CHERRY | |
| | D - GRAPE | |
| | E - GINGER ALE | |
| | F - COLA | |
| ____ | EA MAXWELL HOUSE INST | 2.30 |
| ____ | EA NESTLE CREAMER | .95 |
| ____ | EA TASTERS CHOICE | 3.45 |
| ____ | EA INSTANT HOT CHOCOLATE | .10 |
| ____ | EA DOMINO SUGAR CUBE | 1.20 |
| ____ | TETLEY TEA | 1.35 |
| ____ | EA PROTEIN 29 SET | 1.05 |
| ____ | EA PROTEIN 21 SHAMPOO | .95XXXX |
| ____ | EA PRELL SHAMPOO | .80 |
| ____ | EA HEAD & SHOULDERS | .80 |
| ____ | EA ADORN | 1.35 |
| ____ | EA TAME | 1.35 |
| ____ | EA DIPPIDY DOO | 1.20 |
| ____ | EA ULTRA SHEEN | 2.30 |
| ____ | EA DIXIE PEACH - LGE | .80 |
| ____ | EA DIXIE PEACH - SMALL | .55 |
| ____ | EA BOBBY PINS | .30 |
| ____ | EA COMB & BRUSH SET | 1.10 |
| ____ | EA AFRO COMB | .55 |
| ____ | EA BARBER COMB | .30 |
| ____ | EA AFRO PICK | .75 |
| ____ | EA CURLER COMB | .40 |
| ____ | EA FINGER NAIL CLIPPER | .30 |
| ____ | EA TOE NAIL CLIPPER | .30 |
| ____ | EA TWEEZERS | .50 |
| ____ | EA SEWING KIT | .80 |
| ____ | EA HAIR ROLLERS-FOAM | .70 |
| ____ | EA HAIR ROLLERS-PLASTIC | .40 |
| ____ | EA LAVORIS MOUTHWASH | .80 |
| ____ | EA CLOSEUP TOOTHPASTE | 1.05 |
| ____ | EA POLIGRIP | 1.05 |
| ____ | EA POLIDENT | 1.15 |
| ____ | EA MESSANGELL DOUCHE | 1.05 |
| ____ | EA TAMPAX 40'S | 1.80 |
| ____ | A - REGULAR B - SUPER | |
| ____ | EA FEMININE SYRINGE | 3.05 |
| ____ | EA EMORY BOARDS | .30 |
| ____ | EA DENTAL FLOSS | .60 |
| ____ | EA NOXEMA SKIN CREAM | 1.20 |
| ____ | EA ARTRA SKIN TONE | 1.30 |
| ____ | EA HENNEN'S BABY POWDER | .80 |
| ____ | EA HENNEN'S BABY OIL | .75 |
| ____ | EA HENNEN'S BATH TALC | 1.00 |
| ____ | EA ARMENS POWDER | 1.00 |
| ____ | EA QUINSANA FOOT POWDER | 1.00 |
| ____ | EA JERGEN'S LOTION | 1.40 |
| ____ | EA CHAP STICK | .45 |
| ____ | EA AFRO SHEEN HAND-BODY LOTION | 1.00 |

28

**********PLEASE CIRCLE ITEMS YOU WISH TO RECEIVE**********

| | | |
|---|---|---|
| ____ | EA GILLETTE TRAC 2 SET | 3.50 |
| ____ | EA GILLETTE TRAC 2 BLDG | 1.30 |
| ____ | EA GILLETTE DBL EDGE SET | 1.25 |
| ____ | EA GILLETTE DBL EDGE BLD | .85 |
| ____ | EA MAGIC SHAVE - BLUE | .70 |
| ____ | EA MAGIC SHAVE - RED | .70 |
| ____ | EA MAGIC SHAVE - GOLD | .85 |
| ____ | EA SHAVING BRUSH | 1.20 |
| ____ | EA STYPEC STICK | .25 |
| ____ | EA AFTA SHAVE | .95 |
| ____ | EA Q TIPS | .50 |
| ____ | EA GRIFFIN SHOE POLISH | .25 |
| | A - BLACK B - BROWN | |
| ____ | EA EYEBROW PENCILS - BLACK | .55 |
| ____ | EA EYE SHADOW | .90 |
| | A - SAPPHIRE BLUE | |
| | B - PERL WHITE | |
| ____ | EA MASCARA | .80 |
| | A - BROWN | |
| | B - BLACK | |
| ____ | EA EYEBROW LINER | 1.00 |
| | A-BLK B-DK BRN C- BRN | |
| ____ | EA ANGEL FACE COMPACT | .85 |
| | A-RACHAEL B-NEW IVORY | |
| | C-SUN TAN D-TAWNY E-TROPIC SUN | |
| ____ | EA APPLES | 15 |
| ____ | EA ORANGES | .15 |
| ____ | EA GRAPEFRUITS | .25 |
| ____ | EA NICKELS ($2.00 MINIMUM) | 2.00 |
| ____ | [illegible] | |

WATCHES

| | | |
|---|---|---|
| ____ | EA WOMEN'S A | 8.05 |
| ____ | EA WOMEN'S B | 10.20 |
| ____ | EA MEN'S A | 8.85 |
| ____ | EA MENS B | 10.90 |

BATTERIES

| | | |
|---|---|---|
| ____ | EA SIZE AA | .25 |
| ____ | EA SIZE C | .30 |
| ____ | EA SIZE D | .30 |
| ____ | EA SIZE 9V | .39 |
| ____ | EA SOAP DISH | .30 |
| ____ | EA | .35 |
| ____ | EA IRISH SPRING | .45 |
| ____ | EA SPEED STICK | .55 |
| ____ | EA MUM | .55 |
| ____ | EA SECRET ROLL ON | 1.20 |
| ____ | EA SHOWER SHOES | 165 |
| | A-SM B-MED C-LGE | |
| ____ | EA ATHLETIC SUPPORTERS | 2.20 |
| | A-SML B-MED C-LGE | |
| ____ | EA GYM SHORTS | 2.95 |

EX

| | | |
|---|---|---|
| ____ | EA COMPOSITION NOTE BOOK | .75 |
| ____ | EA RADIO | 25.99 |

LIMITS ON THE FOLLOWING ITEMS

(1) FRUITS - 10
(2) PENNY CANDIES 25
(3) CANDY - x2 10

YOU ARE PERMITTED TO SPEND $15.00 A WEEK NOT TO EXCEED $45.00 PER MONTH

THE FOLLOWING ITEMS ARE NOT INCLUDED IN $45.00 MONTHLY LIMITATION
(1) RADIOS
(2) B TYPE WATCH
(3) GYM SUITS
(4) SNEAKERS

ALL NONCASH ITEMS ARE POSTED ONE DAY AFTER YOU RECEIVE YOUR PINK RECEIPT FROM THE WAITROOM

ALL NONCASH ITEMS EXCEPT POSTAL MONEY ORDERS ARE SUBJECT TO 30 DAY CLEARANCE.

NAME _____

[illegible] _____

INMATE NUMBER _____

SECTION _____

ROOM _____

TO INSURE THAT YOU RECEIVE THE PROPER ITEMS CIRCLE THE ITEMS THAT YOU WISH TO RECEIVE.

SNEAKERS 18.00

SIZES 8½ 9 9½ 10 10½ 11 11½ 12 13

SWEAT SUIT 12.90

A-SML B-MED XXLGE TEMP OUT

**********PLEASE CIRCLE ITEMS YOU WISH TO RECEIVE**********

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MEF)

UNITED STATES *ex rel.* WOLFISH, *et al.*, RELATORS

*v.*

EDWARD LEVI, *et al.*, RESPONDENTS

## AFFIDAVIT

STATE OF KANSAS )
) ss.:
COUNTY OF SHAWNEE )

WILLIAM WALTER MENNINGER, M.D., being duly sworn, deposes and says:

1. I am a physician practicing the specialty of psychiatry, certified by the American Board of Psychiatry and Neurology. A copy of my curriculum vitae is annexed hereto and made a part of this affidavit.

2. On May 19, 1976, I visited the Metropolitan Correctional Center in New York City (the "MCC") and toured that institution. Included in my tour were those areas of the MCC where inmates were being "double-bunked," i.e. two individuals were housed in one residential room. Those areas included the Honor Unit on the second floor, Unit 3, the seventh floor and the ninth floor. In addition, I have reviewed the Respondents' 9 (g) statements in this action, dated October 19, 1976, and the affidavit of Marshall Haimes dated October 19, 1976.

3. Based upon my personal observations of conditions at the MCC, my review of the materials described in paragraph 2 above, and my experience in the field of psychiatry, particularly psychiatry as it relates to detention and correctional settings, it is my opinion that "double bunking" as practiced at the MCC should not have any significant detrimental effects on the physical

or psychological health of the inmates at that institution. Some important factors which prompt me to reach this conclusion are (a) the architectural design and finish of the residental rooms and commons areas which convey a non-penal atmosphere and a sense of openness; and (b) the limited period of confinement of any given inmate to the room itself, both in terms of time each day (locked in only for sleeping hours and two count periods), and length of stay (majority of pre-trial inmates are in the MCC 20 days or less). Although the area of some of the residential rooms used for double-bunking may not be ideal, I have not seen any evidence that the "double-celling" practice at the MCC has caused any untoward effects on individual inmates. It does not appear to be psychologically destructive or an unacceptable deprivation of privacy; and there is no evidence it has prompted any increase of deviant sexual or aggressive impulses or tendencies.

/s/ William Walter Menninger, M.D.
WILLIAM WALTER MENNINGER, M.D.

Sworn before me on this 27th day of December, 1976.
[SEAL]

/s/ Shirley Barncord 12/27/76
SHIRLEY A. BARNCORD
Notary Public

My Commision Expires September 10, 1977



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MEF)

UNITED STATES *ex rel.* WOLFISH, *et al.*, RELATORS

*v.*

EDWARD LEVI, *et al.*, RESPONDENTS

AFFIDAVIT

STATE OF NEW YORK )
COUNTY OF NEW YORK ) SS.:
SOUTHERN DISTRICT OF NEW YORK )

LARRY TAYLOR, being duly sworn, deposes and says:

1. I am the Warden at the Metropolitan Correctional Center, New York, New York ("MCC") and a named respondent in this action. I am familiar with the matters set forth herein and submit this affidavit in opposition to petitioner's motion for partial summary judgment.

2. Commencing in late November 1975, the MCC started to replace single beds in some of the residential rooms with double-bunks. As set forth in my prior affidavits submitted herein (dated December 10, 1975 and October 19, 1976), double-bunks were installed in some of the residential rooms to accommodate an expected rise in the inmate population. The following schedule sets forth the present extent (and location) of double-bunking at the MCC (excluding the dormitory unit on 11-South):

| UNIT | No. of Rooms Double-Bunk | Single-Bunk |
|---|---|---|
| Honor Unit | 14 | 7 |
| 3 | 24 | — |
| 7-North | 11 | 37 |
| 9-North | 24 | 24 |

3. The process of installing these double-bunks was substantially completed by February 1976.* The number of double-bunked rooms in the Honor Unit has changed over time as (a) we increased the number of Honor Unit rooms by one (room A-206 has been added and is designated to have two beds), (b) we increased the number of rooms designated to have two beds, and (c) the number of individuals housed in this unit has fluctuated.

4. Since the time that installation of the double-bunks was completed, the number of double-bunked rooms which have actually housed 2 inmates has varied from day-to-day (up to the present maximum of 73 rooms) depending upon the size and composition of the inmate population, and the availability of single-bunked rooms. For instance, although a single-bunked room might be available in the Honor Unit, an inmate in a double-bunked room on Units 7-North or 9-North would not be assigned to that single-bunked room because of security considerations (*i.e.*, the Honor Unit is not locked in and is under less supervision than the other units); likewise, if a single-bunked room is available on 5-South (women's unit), a double-bunked inmate from 7-North or 9-North, all of whom are male, would not be assigned to that single-bunked room. In addition, the MCC's policy is to house pre-trial inmates separately from post-conviction inmates to the greatest extent possible, and therefore, if a single-bunked room is available in a post-conviction unit, a pre-trial detainee would not generally be assigned to that room and would be assigned to a pretrial unit and possibly a double-bunked room there (if no single-bunked rooms were available). Although Unit 3 has the capacity to house 48 inmates (all 24 rooms are double-bunked), the MCC has placed a limit of 40 as the maximum number of inmates to be housed in this unit. On a few occasions in the past, the total in this unit reached 41 inmates; for the past several months, the average number of inmates in this unit has been 37. As set forth in the Rule 9(g) Statement, this unit is used to

* Respondents Rule 9(g) Statement, p. 21, erroneously noted that 23 rooms on 9-North, rather than 24 rooms, were double-bunked.



house inmates in protective custody, and because of that fact, inmates from the general population can not be housed in this unit.

5. Consistent with these above-described constraints, I have, however, directed and instructed the unit managers to minimize the use of double-bunking by seeking to first fill all available rooms on a one-person-per-room basis and then, only if needed, to assign inmates to the second bunk. I have further directed the unit managers that when a single-bunked room becomes available in a unit, the inmate in that unit with the longest period of assignment to a double-bunked room should be reassigned and transferred to the single-bunked room. Although on occasion these various policies and directives have not uniformly been implemented, substantial progress has been made in this regard, and further steps are being taken to ensure maximum conformity with the above-described guidelines.

/s/ Larry Taylor
LARRY TAYLOR
Warden, MCC

Sworn to this 29th day of December 1976.

/s/ [Illegible]
Notary Public

[112] * * * A At the termination of an attorney visit on the third floor, one has to undergo the same strip-search procedures, generally in the bull pen, that one undergoes when he completes a social visit; the entire strip-search procedure.

Q Would you describe what that includes?

A Describe the strip search, Mr. Young?

Q Yes.

A It includes taking off all of your clothes in front of a member of the corrections staff, generally [113] raising your arms and displaying your armpits, opening your mouth, raising your genital organs, spreading your rear cheeks, showing the bottoms of your feet, having the officer examine your clothing, and then getting dressed again.

Q All right.

A Then you have the problem of the delays in the bull pen relative to getting back up again. But there—

THE COURT: Delays in what?

THE WITNESS: The holding area, your Honor, on the third floor, where you wait again for an escort to go back up. And when you get back up, you have another strange problem because the vast majority of the legal visits are held in the general visiting room. The inmate population always suspects anyone who goes down to the third floor for a visit, because that is commonly thought to be the place where government agents and government attorneys interview prospective witnesses and such. So anyone having attorney visits down there, since it is not the general procedure to have a private room, is always suspect by the inmate population.

[134] A Yes, sir.

The same [s]trip search procedure that I outlined before relative to attorney visits is standard procedure coming out of the visiting rooms.

Q And what is the effect of that search on your visit?

A Well, to me, it's senseless, it is embarassing, it is degrading.

The effect of it on the visit itself is to tell people not to bother to come unless you really want to see them



or need to see them. But that is the effect of the entire circumstances of visiting, really.

Q Could you tell me when—

THE COURT: Is that search made both before and after the visit?

THE WITNESS: No, your Honor. There are a few Correction officers that do that, but generally speaking I would say in my personal experience 45 percent of the time I am patted down going in and going through that entire procedure on the way out.

Q You testified that your schedule for social visiting is 12.30 to 3.30 certain days a week.

A That is correct.

* * * *

[219] We always get requests for certain books on prison litigation and books on federal forms and things of that nature that we just didn't have.

Basically, that's it. All case law and state law is basically what we were missing.

We also ran into problems whenever there was a popular case because we weren't allowed to Xerox the case. In certain cases I was always in favor of making a Xerox out of them and sending a Xerox to the inmate who requests a case so you don't have to send them the whole hard-cover book because they tend to get ripped out of the hard-cover book and if there is one or two cases pertaining to parole law or prison litigation or some such thing it presents a problem. So we don't have Xerox available in the education department so we never were able to do that and we had to send the book, which presented a problem. Sometimes the books were no good because the pages were missing and we still have that problem.

Q In connection with the law library, did you also have responsibility for the general law library?

A Yes, sir, I did.

Q Would you explain the nature of those responsibilities? Were they essentially the same as [220] your responsibility for the law library?

A Well, the general library was a step backwards from the law library. We still had books in boxes and

such at that point and things had to be put away. Nothing was catalogued, nothing was categorized, and there was really no system at all in the general library at that point. There were also very, very few books in circulation.

I started, I tried to just spread the word that the books were there and put books into circulation as often as possible. There was no request form for someone to ask for books from the general library, so I told people, whenever I could spread the word, to use the law library form to send up for the books.

There was no list of the books available. So really it was there but it wasn't functional when I started. I tried to make it as functional as I could.

Q And did you ever receive any requests for general categories of books—for example, westerns or—

A I used to tell people that because we had no list of titles. So if someone asked for a western or a textbook on biology or something, I would find the thing [221] that was closest to it and send up a couple of books and that was about the only way we could operate. That's about the best we could do.

Q Mr. Gardner, subsequent to your return, most recent return, to the MCC, have you complained to Mr. Harris or any other prison official concerning the availability of general library books?

A Yes, I wrote to Mr. Harris and asked him what was available. I suggested, as we have, as I had many times in the past, that a list of what's available in the general library be posted some place where people could see it and people would have some sort of form where they could request books from the general library and the books be made available.

Q Mr. Gardner, referring your attention to Petitioners' Exhibit 19 for identification, is this a cop out which you prepared for Mr. Harris?

A Prepared and sent to Mr. Harris, yes.

Q Did you receive—sorry.

MR. SCHAFFER: No objection.

(Petitioners' Exhibit 19 was received in evidence.)



Q Did you receive a response for that cop out? [222] A Well, that's tricky. I never received an answer directed at me but about a week later a notice appeared on the bulletin board saying that a list of all books was no available in the unit manager's ofgice and all you had to do was see the unit manager to see the list of books.

I think we previously discussed the lack of availability of the unit manager. I never received an answer from Mr. Harris, no.

Q Could you describe the types of books that are available in your unit itself? Are there any books available in the unit?

A Some soft-covered books. There is a little book tray with three or four levels. It, again, was empty until about six weeks ago but it was recently filled. But there are very, very few titles and there is really nothing worth reading on it. It is basically the same books over and over again. It's trashy sort, covered sort of things.

* * * *

[248] Q Has your room ever been searched?

A Yes, sir.

Q Have you always been permitted to observe that search?

A No. I've never been permitted to observe that search.

Q Have you had any materials confiscated during such searches?

A Yes, sir, I have.

Q Can you identify what those items were?

A Minor things. I had some vitamins I managed to get from sick bay that I had put into a different envelope, into a white envelope. And such contraband as Tylenol and aspirin and extra clothing, and just things that you accumulate over a period of time. Nothing serious was ever seized from me.

Q All right.

A Never anything worthy of an incident report or anything of that nature.

Q Mr. Gardner, are you permitted to receive food packages or other personal effects at the Metropolitan Correctional Center?

A Once a year. One package a year during the holidays, sir.

[249] Q All right. Are you permitted to receive personal effects, or is that limited to food?

A Are you talking about that package once a year?

Q Yes.

A It is limited to food. It is hermetically sealed. There is a note put on the bulletin board that says Johnson has discretion over what can come in and what can't come in. But it is limited to food and certain types of packages.

THE COURT: Can you get chopped liver at that time?

THE WITNESS: Fortunately my mother didn't send me the package. No, your Honor.

THE COURT: I know you don't want it.

THE WITNESS: I think not, unless I can find it hermetically sealed from a chopped liver factory.

* * * *

[255] Q Just one of the items you referred to are the Timex watches. Are you permitted to have your own watch at the Metropolitan Correctional Center?

A You are permitted to have only the Timex watches, which are sold at the commissary, but the commissary hasn't had them in many months.

Q Maybe I should clarify that question. Are you permitted to bring a watch in from the outside when you come into the Metropolitan Correctional Center, say if you had your own before you were incarcerated?

A No, sir.

Q Mr. Gardner, I believe it is going to be the stipulation of the parties here that you are permitted to spend up to $15 a week or a maximum of $50 a month at commissary.

Is that it?

MR. CORSI: That's correct.

A That's correct.



Q Do you usually spend that amount of money?

A When I have it available, I certainly spend it. You have to realize you spend $4 a week for change generally for the telephones. So that's $16 a month or $20, if there are five Fridays in a month. [256] Those who smoke have that additional expense. If you buy your cigarettes or tobacco and your $4 in change and a jar of coffee and cream, you have spent your $15.

* * * *

[436] A Yes, going in we are given what is called a pat-down search.

Q How about coming out of the visiting room?

A Coming out we are stripped down naked.

Q That's all?

A We are stripped down naked and we have to display our private parts to the guard. They make us bend over and look up our anus.

Q Would you describe the effect of that search on the visit?

A It's not only degrading and humiliating but it seems to break up the whole tranquility of the visit that you just had, the nice head that you walk out of the visiting room with is like a crash.

* * * *

[488] Q Has your room ever been searched?

A Yes.

Q How often?

A Just twice since I have been there.

Q Have you been permitted to observe those searches or not?

A No.

Q Has anything been seized from your room during those searches?

A Yes.

Q Could you describe what items were seized?

A On the first search a tape recorder was [489] confiscated and several tapes that I had made, mostly pertaining to my life story, and that last one was right after the holidays of this year, 1977, and at that time

I had about six neckties in my drawer and they were confiscated and four of them were lost.

Q The tape recorder was subsequently turned over to your wife, wasn't it?

A Yes.

Q What happened to the tapes?

A They were also turned over to my wife.

Q What was the condition of your room after these searches? Was everything put back into place?

MR. SCHAFFER: Objection.

MR. YOUNG: The respondents maintain that everything was put back.

MR. SCHAFFER: The question was what was the condition of the room.

THE COURT: Yes, try to watch that.

Q What was the condition of the room after the search?

A Well, the condition of the room after the first search with the tape recorder was pretty good condition. It just took me a few minutes to put it back together. [490] After the second search things were pretty must just messed up and pushed all over the place.

Q Could you be more specific? Could you describe what was messed up and pushed all over the place?

A Yes, there were legal papers and everything thrown all over the bed because I had them in piles on top of the bed and they were just pushed all over the bed and some of them were on the floor. I guess it took me about a half hour, 45 minutes, I am not sure, to fix the room up.

Q Do you ever keep any food in your room?

A Yes, on occasion I have kept food in my room.

Q Are you permitted to receive food packages from outside?

A No, sir.

Q Have you ever been criticized or been told by unit staff members that you are not supposed to keep food in your room?

A Yes, I was.

* * * *



[527] Q Miss Braunig, are you subjected to any type of search incident to attorney visits?

A Yes. I am subject, I have been subjected to a strip search which is very degrading.

Q Is this before or after the visit?

A After the visit.

Q Would you describe the nature of that strip search?

A We are required to take all of our clothing off, to squat, to expose. It's very, it's very embarassing.

Q When you visit with an attorney on the third floor are you also subjected to such a search?

A Yes.

Q Who conducts that search?

A It's different every time. * * *

* * * *

[608] BY MR. YOUNG:

Q Miss Braunig, has your room ever been searched [609] when you were at the Metropolitan Correctional Center?

A Yes, it has.

Q On approximately how many occasions?

A Four or five that I can think of off the top of my head.

Q Could you describe, first of all—I withdraw that. Was anything seized during any of the searches?

A Yes.

Q Would you describe the items that were seized?

A Jumpsuit, my second blanket, linen. That's about it.

THE COURT: What was that last item?

THE WITNESS: Linen.

Q What was the condition of your room after it was searched?

A Dissheveled, things were strewn all over, every place, especially my legal papers. It took me a week to refile them.

Q Have you been advised recently by the MCC staff that there are going to be more searches?

A Yes, I have.

Q Would you describe the nature of that ad- [610] vice?

A There is a memorandum on the board to that effect, requesting by the lieutenant of the officers.

Q Miss Braunig, it's been stipulated that inmates at MCC are not permitted to receive food packages or personal effects except for a food package at the holidays. Would you describe the effect of not being able to receive such packages?

A Well—

Q Were you able to receive such packages at other institutions?

A Yes. At Alderson I was able to. Michael's mother was able to send me a bathrobe and slippers. I was able to receive music, things like that, to play.

* * * *

[737] Q Would you agree that you are representing a carton approximately two feet by two feet by two feet?

A I couldn't begin to tell you. I have absolutely no depth perception.

THE COURT: Why don't counsel stipulate on that?

MR. YOUNG: We will stipulate that.

THE COURT: You think it is about two feet?

MR. YOUNG: Well, the measurements she was showing with her hands are about two feet.

THE COURT: Okay. Go ahead.

Q And did I understand correctly, Miss Braunig, that you testified that after one room search it took you a week to refile those pape s?

A Yes. The contents of four separate boxes were strewn.

Now, I had—

Q Just answer the question.

A Yes, it took me approximately a week to refile everything. That envelope was taken—

Q Mr. Gardner had eight boxes in his room?

A I believe so.

* * * *



[815] Q I would like you to assume that after each visit an inmate at the MCC is brought into a room connecting the visiting room with the modular unit and is there asked to remove all his clothing where he is searched by a prison guard. The search requires the inmate to expose his mouth and turn over and spread his rectum for visual inspection by the guard.

Do you have an opinion as to whether or not—those searches I would like you to assume are conducted as a matter of routine after each visit.

Do you have an opinion whether or not such searches are necessary?

A This is another one of Correction's undying traditions. In all the years that I have been in the prison business, I have never yet heard of any contraband being found in the anus of any prisoner and yet day after day after day they reduce prisoners to that indignity.

[816] How one could even hope to inject any such thing into such crevices when he is wearing those monkey suits is beyond my comprehension. It's a residual thing, and has been aroun every since I can remember.

I have asked dozens of Wardens, have you ever found anything?

No, never found anything.

Why do you do it?

We have been doing it for years. And, that's it.

I believe with the electronic equipment we have now—the only thing you have to worry about in terms of introduction of contraband into an institution is narcotics, and money. The electronic equipment or the airport-type equipment we have at the front door can, if done with any kind of viligance, will avoid the other introduction, weapons and saw blades and that sort of thing. So we have to worry a little bit about narcotics and such-and-such.

But, I think the kind of indignities I have just described to prevent the introduction of, say, narcotics into place, and they can come in a variety of ways if they are brought in at all, just doesn't justify continuously reducing a human being to a less [817] than human quality.

Q Do you recall how many people were present in the visiting room having visits yesterday when you were there?

A I sat on the fifth floor yesterday. The last time I was on some other floors. The fifth floor on the women's side there were couples, not crowded at all. On the men's side there were 26 people. That counted me and my associate. Obviously there were 24 people engaged in the visiting. It was very crowded in there during that period.

Q Do you have an opinion whether or not the room is adequate for that amount of people?

A 24 would be an absolute maximum and it could be reduced I say if they increased the hours of visiting. You didn't have much sense of privacy. You were almost on top of everybody.

Q Generally, could you describe what the importance of visiting is for a population such as that at the MCC?

A It's the one thing that keep them normal. It's the one thing that keeps them related to a real world. It's the one thing which is the sum and substance of what they live for.

* * * *

[899] Q I would like you to assume, doctor, that rooms at the MCC and other living spaces at the MCC are searched periodically by guards who search detainees' properties, and may confiscate items, but inmates of the MCC are not allowed to see such searches. Do you have an opinion as to this practice on the mental well being of the inmates of the MCC?

A Yes. The relationship between inmates and staff in most prisons is one of mutual distrust, [900] and tend to be of an adversary nature rather than one in which there is some kind of alliance and cooperation toward a common goal. And as a result of that suspiciousness and distrustfulness, not only of inmates for staff but of staff for inmates is very intense.

My opinion is anything which aggravates that kind of relationship between staff and inmate is harmful to the inmate and harmful to the goals of the administration and institution because it makes it more difficult



for them I think. This search is one of many ways in which this kind of staff relationship and attitude of inmate is aggravated. If his personal living space is going to be searched and he is not allowed to be there to see what happens, the kind of characteristic paranoid suspicion he is thinking is focused on that and inmates describe their fears about the loss of what to them are very valuable personal possessions, which may be nothing more than photographs of family or friends, but many of them are confiscated during the searches, and also the fact that they can't see. The fear the staff is going to plant something there and then charge them with having contraband and they would have no way to say anything [901] about that was expressed.

The most harmful effect of that procedure is to aggravate the mutually distrustful relationship between inmates and the staff.

Q What is the importance of personal property to a person in an institution such as the MCC?

A Well, in the MCC and in most other prisons the personal property allowed is severely limited. Many items are declared contraband which are just, in my opinion anyway, ordinary and not dangerous items, not only in the prison but items that the men might be used to having on the outside. So the few things he is allowed to have assume extraordinary importance and they tend to be often such items as toiletries, for example, which in most prisons are really very limited so that if a man has soap, deordorant and that sort of thing it is very important to him. And photographs in particular assume great importance because they become a link with the person or persons from whom the man is separated by the imprisonment. Because of that effect it assumes extraordinary importance. To lose that is a great loss, although to us it might not seem so.

* * * *

[909] Q Doctor, I would like you to assume that there are no vending machines in many of the visiting rooms at the MCC, nor are visitors or inmates allowed to bring food with them into the visiting room.

I would like you also to assume that the washrooms, the rest rooms, which are present in each visiting room are locked and may not be used by inmates or the visitors or the children.

Do you have an opinion as to what effect, if any, these factors have upon visits at the MCC?

A Well, that almost seems designed to make people miserable, to not have such elemental, again, requirements as toilet facilities and drinking water, at least. And also I'm sure that it has the effect of discouraging visits. It must be very difficult for a family with small children, for example, to remain for any length of time without a bathroom and some sort of drink.

I can't say that the food is essential, but it certainly would make a much more, I think, pleasant visiting situation in many respects.

Q I would like you to assume that after each visit inmates, whether male or female, are escorted into an area which connects the visiting room [910] to the modular unit and there they are asked to remove all their clothing for a search by a correction officer. That search requires the inmate to expose the palms of his hands and his feet, to open his mouth for visual inspection, and requires the inmate, in addition, to turn around, bend over and expose his rectal area for visual inspection by the guard.

Assuming that to be the procedure after each visit, do you have an opinion as to what, if any, is the psychological effect of that search procedure?

A Yes. It probably puts the inmate into the most humiliating kind of situation which is possible. It also, I think, leads to the aggravation of this adversary relationship which I described between the prison administration and staff and the inmates. And there are a number of aspects to this.

Not only being stripped naked, which is embarrassing to most, again, people in our culture, but the requirement of having to bend over and expose one's rectum, or anus, is particularly objectionable and humiliating to particularly men in this culture and in the prison setting, and there are some specific reasons for that.



Part of the inmate-staff relationship has [911] to do with domination and submission, the staff obviously dominating, and the requirement being that the inmate submit. This is just in general.

There becomes injected into that in many cases, just because human beings are the way they are, a kind of sadistic component on the part of the staff which does not necessarily imply physical mistreatment or injury inflicted but a kind of psychological sadism. And I've seen this procedure done many times in many prisons, and it has been almost without exception done in a way which I felt was excessively and unnecessarily psychologically cruel, in terms of taunts and jokes and remarks which put the inmate in, again, an extremely humiliated position, put him down, impressed upon him the fact that he was under control and he had to do exactly what he was told. That is another part of it.

Another aspect of it, again especially in prisons, is the whole atmosphere regarding homosexuality, which is all tied into this whole attitude and condition of domination and submission, sadism and masochism, and is of obvious concern in every prison. And from that point of view the position of having to bend over and expose one's rectum for a man is the most [912] vulnerable, and many inmates will specifically say that they have a fear of sexual assault in that kind of situation, where they are helpless and exposed.

I am not saying that it happens or that it doesn't happen often. I don't know. But the feeling is there, and I think it has an overall very detrimental effect not only upon the inmate but upon eventually the operation of the institution, because it again is a factor in aggravating this kind of relationship between the staff and the inmates. I think it just makes the job more difficult.

Beyond that I will say, as a doctor, that it just doesn't make sense to me, in terms of the fact that it be almost impossible to conceal anything of any bulk between the buttocks and not have it obvious to everybody, in terms of the way one would have to walk and carry one's self, and also to insert something into the rectum is difficult, painful, would require time and opportunity

which is not available in the visiting areas, and the search wouldn't find it anyway.

Q Why is that, doctor?

A If an object is inside the rectum, it has been passed through the anal sphinter, which holds [913] the rectal cavity closed, and there is no way that one can get inside there by simply having a person bend over and spread his buttocks. It requires an instrument to open that muscle.

* * * *

[979] That isn't what you asked me in this case.

Q I thought I used the word "reasonable." Are you distinguishing—

A Reasonable requires some kind of standard. Fairness I think is a more generally applicable quality.

Q If the practices that you have been testifying about were fair and rational and were perceived as such by the inmates, then it would be your opinion it would ameliorate the negative psychological effects?

A Generally, yes.

Q Dr. Rundle, you testified as to the general problem of distrust between inmates and staff and of an adversary relationship between them. What evidence of that did you see at the MCC.?

A I can't speak specifically of anything at MCC except a general impression which I gained in talking with a number of inmates and it had to do with several specifics. For example, request for medical attention, which according to the inmates' view went unanswered, and in more than one case their interpretation, to mean that the officer or person responsible on the floor deliberately destroyed the requests. But much of that is really based upon an [980] opinion which I hold from general knowledge of prisons, not specifically this one.

Q With respect to the procedures followed in searches of rooms, you testified as to fear of inmates that valuable personal possessions would be taken, such as photographs of members of their family or loved ones.

Are you aware of any evidence that any such property has ever been seized at the MCC?

A No, I'm not.



Q Did any of the inmates with whom you spoke at the MCC voice that particular fear to you?

A I think not.

Q Doctor Rundle, when you made your tours and had these interviews with inmates, how did you pick which inmates to talk to? Did you choose them at random or were their names given to you by someone?

A Well, on the tours in casual contacts, whatever happened. Some of them might have approached me or I might have approached them to ask a question. In the more detailed and longer interviews it was my own wish to interview inmates from specific areas and who met certain conditions. That is, someone in the dormitory who had been there perhaps a long time, some- * * *

* * * *

[992] A Well, I think I explained that in this culture, with men at least, that having to bend over in that particular position creates a feeling of extreme vulnerability and embarrassment and humiliation. There is a certain degree of embarrassment, perhaps, and humiliation involved in having to strip naked in front of one's keeper and show himself in that manner. But it is not as extreme as if he is forced to assume this position.

Q In your tours of the MCC, did you ever see any evidence of guards making snide or derogatory comments during a strip search?

A No.

Q Did you see any strip searches?

A No.

Q Did any inmates tell you that they had experienced any such snide remarks by a staff member of the MCC?

A No.

* * * *

[994] Q You testified in connection with strip searches that there is a fear of sexual assault by an inmate who is forced to bend over and expose his rectum. Are you aware of any evidence of such sexual assault at the MCC?

A No, I'm not.

Q Did any of the inmates you interviewed state to you theri fear of such sexual assaults at the MCC?

A Specifically there, I think not.

Q Dr. Rundle, in your testimony in the Queens House of Detention case you held up the MCC visiting room as something of a model in comparison to the visiting facilities at the Queens House of Detention, did you not?

A Yes, I did.

Q And on that occasion you did not express any reservations concerning the lack of access by visitors to the units or private rooms, did you?

A No, I didn't. But I think that should be taken in the context of the conditions at the Queens House, for example, where visiting was in a situation in which the visitor was closed in a very small, steel and glass or plastic closet and the inmate was on the other side of a plastic or glass partition and communication was through a telephone.

* * * *

[1069] A Yes, I have.

Q Would you describe the types of books on those shelves?

A We have cookbooks. We have a couple of education books. We have adventure books.

We have fiction novel books. We have some—and we have a few bibles and a couple of religious books.

Q Have you observed that shelf on a daily basis since you arrived at MCC this most recent time?

A Well, I generally don't go there to read aby books because I know approximately what's available and nothing to my liking. I have noticed at times that they have changed the books because when they change the books there seems to be a mob around the books for the next couple of days to look and see what books are available, if there is something worth reading there.

The same amount of times that they have brought up magazines, the few times that they have. So I did the other day out of curiosity scan the books and magazines that were available.

Q You stated you have had an opportunity to observe the times that they have changed the books on



those shelves. Have they changed those books since you returned on February 2?

[1070] A No, they have not.

Q Have you stated that you also examined the magazine. Did you at my request prepare a list of the dates of those magazines?

A Yes, I did.

Q I'm going to show you Petitioners' Exhibit 119 for identification and ask you if this is a list that you prepared?

MR. CORSI: Your Honor, I'm going to object. First of all I think he should put questions to Mr. Miller as to what his memory, what he can tell us from memory.

THE COURT: No, I don't want to go through that.

Q Is that the list that you prepared?

A Yes, that is the list.

Q Is it accurate to the best of your recollection?

A I handed it personally to Mr. Whitehead and I asked—he was the, he was the unit officer on duty at that time. And I asked him if he wished to check it to see if, if the list was valid or not. And—

Q Did he?

A He looked at the list but he didn't take the time to check it, no.

[1071] THE COURT: Is it dated?

THE WITNESS: Yes, it is, your Honor.

BY MR. YOUNG:

Q When is it dated?

A It's dated March 8, 1977.

MR. CORSI: Your Honor, I note that this exhibit doesn't list the names of magazines. It's just dates and the number of magazines.

MR. YOUNG: I believe Mr. Miller testified that that is what he put on the list. I'm going to introduce this into evidence.

MR. CORSI: No objection.

(Petitioners' Exhibit 119 was received in evidence.)

Q Mr. Miller, are newspapers sold on your floor?

A Yes, they are.

Q Have you always been able to purchase a newspaper when you wanted one?

A To a large percent of the time, yes.

Q Have you ever observed other inmates who were unable to purchase a newspaper?

A Yes, I have.

Q Would you describe that?

A For a while they had, the individual that was [1072] bringing the papers up to the unit would go to certain individuals and they would get their paper first.

And then if there was any left for these other people we would then be able to purchase them if they were available. I have complained to the people that they should bring up more newspapers and he said that they didn't want to order too many and that it was just possible that when they came to our floor we were the last floor that they came to.

* * * *

[1078] Q Would you describe the last occasion that your room was searched?

A The last time my room was searched was when I was housed on 11 North in Room E-1134. It was some time dur ng the end of the summer, possibly during early fall.

Q Would you describe the sequence of events relating to that search?

A Well, in the late morning hours we were all locked in our rooms. We weren't told why that I can remember. They might have said that they were going to make a count of something but they didn't say it was for a search.

Anyhow, we were locked in our rooms and, and then a contingent of officers came up and worked in groups of three and went to each individual room, unlocked his door, took him out and had him strip out in the hall in view of all the other inmates that were locked in their rooms. And we stood out there and the other two officers went into our room and searched it.

Q Were you permitted to observe that search?

A No, we weren't permitted to observe it.



[1079] Q Were any items seized from your room during that search?

A Yes, there was.

Q Would you describe what those items are?

A The items that were taken from my room that I know of, I had a can opener taken from my room, some envelopes, some pens. I had a thermos. That's all I can think of.

Q Were any items of clothing taken from your room?

A Yes, I had, I did have some, some underwear stolen. I believe socks or undershirts. I'm kind of vague on exactly what was taken.

I know the shorts were taken. That's all I could think of as far as the clothing.

Q Were any of these items returned after the search?

A No.

Q Will you describe the condition of your room after the search?

A The papers that I had on my desk were all disoriented as were the papers that were in the desk. I had to remake my bed and I had a box on my floor in the corner of the room that, where I was going back to the [1080] State. I had put whatever I was going to bring back to the State with me in this box.

I had it all neatly packed in there and I had to repack that whole box.

Q Mr. Miller, it's been stipulated between the parties that inmates at the Metropolitan Correctional Center are not permitted to receive food packages or packages of personal effects.

Would you describe the effect on you of not being able to receive such packages?

A Well, I'm a State prisoner and as such we are entitled to receive a 35-pound package a month exclusive of clothes and magazines.

Q You mean when you're in a State institution?

A Yes. I believe that if we could have books and magazines sent in and foods other than what we give us at the Metropolitan Correctional Center and other than what we do receive in the commissary that we might receive food that we would not only enjoy but food that woulod be nutritional, as many of the things that are

offered in the commissary are cookies and candies and things like that.

For the packages that we are allowed to receive at the Metropolitan Correctional Center I believe that they, [1081] that the package this last time for Christmas was 15 pounds. Whereas I believe the one year prior to that was only 10 pounds, but the items that you are allowed to receive in the package were not that of clothing or magazines and books but that of candy, cookies, and junk foods.

I mean most of the stuff that we could buy in our own commissary if we could have was the same thing we could have got in the package with the exception of cheeses. They did allow us to bring in cheeses and meats if the meats were properly wrapped.

Q Mr. Miller, would you describe conditions relating to the commissary at the Metropolitan Correctional Center?

A Excuse me?

Q The conditions relating to the commissary and your experience with it?

A Right now the present list, the present commissary list there are at least 21 or 27, somewheres around there items that are not properly priced. We've had price changes and these items are not properly priced now. An individual can spend up to $15 a week with a limit of $50. * * *

* * * *

[1100] GLENN MILLER resumed.

DIRECT EXAMINATION CONTINUED

BY MR. YOUNG:

Q Mr. Miller, are you subjected to any type of search incident to visits?

A Yes, we are.

Q Would you describe that search?

THE COURT: Mr. Young, do we have to go over everything more than once, especially things that are not disputed?



MR. YOUNG: Then we will withdraw that question.

Q Would you describe the effect of that search on you?

A The one going into the visiting room isn't as bad as the one comming out of the visiting room because the latter is more thorough. I have had problems coming from the visiting room on a could of different occasions. The worst—

Q Would you describe those problems?

A The worst one in particular was I was threatened by Officer Drew on one occasion in front [1101] of Officer Harry Marshall because when I came out of the visiting room I told them that it was my belief that in a case of Martin Sorsry vs. New York State, or something, he was subjected to anal searches, and I told them that I didn't think that it was legal, and therefore I didn't see where it was necessary for me to submit to such search. And, well, I had told this to the officer when I came out of the visiting room, so he then called the lieutenant on the telephone and the Lieutenant Drew subsequently came to the visiting room and took his radio, whatever they call them, walkie-talkies or something, slammed it down on the desk and turned around and told me that—to—to strip, and I did, and I went through the whole procedure.

And he asked me what the reason was that I didn't do it in the first place and I told him what my reason was. And he told me that the next time he has to come to our floor and I refuse to submit to such search that he was going to put his foot up my rear, in other terms, but that's essentially what he said.

Q If you can recall exactly what he said then don't be embarrassed, please say it.

[1102] A He told me he is going to put his foot up my ass. And Officer Marshall was there and heard the conversation.

That was the worst experience I had coming from there.

I had an experience going in where the officer wanted to go through the same procedure and I told him to call the unit manager, that I thought it was unnecessary to

be strip searched going into the visiting room, and Mr. Rivera came down and told the officer that it really wasn't necessary, but the officer that was on duty then was a new officer anyway.

Q Do you happen to recall that officer's name?

A Yes, his name was Mr. Davis.

Q Any other effects of those searches on you?

A I really feel they are unnecessary. I mentioned it to different officers that I couldn't see the reason for such a search coming out of the visiting room because with the search that they conduct when we go into the visiting room in which they pat the individual down, we don't wear many clothes anyway. I told them that it would be impossible, I had told [1103] many officers that it would be impossible for us to smuggle in guns or anything like that.

I mean if we have it on our person I'm certain they are going to be able to feel it without having to degrade us by taking off all our clothes and going through the type of searches that we are subjected to.

Q Mr. Miller, during the times that you have been at the Metropolitan Correctional Center have you ever had a key to your room?

A Yes, I have had a key to my room.

Q When was that?

A That was when we were on the seventh floor, where we were all issued keys so that if we went into the room for—if we left our rooms we could then lock the doors so that we wouldn't have anybody else going into our rooms or stealing anything or what have you.

Q During what time period was that?

A This was prior to and including the middle of March, 1976.

Q Do you presently have a key to your room?

A No, we do not have keys to our room at this time.

* * * *

[1162] Q Are you always strip searched incident to a visit?

A I am patted down when I go out to the visiting room and most of the time I'm not strip searched when I come back.



Q What about when you leave the visiting room? Are you strip searched on every occasion then?

A That's what I mean. No, most of the time I am not.

Q You are not strip searched?

A No.

Q What do they do when they leave the visiting room?

A Most of the time again there are exceptions where nothing happens at all. Most of the time I am just patted down.

Q Has any guard ever indicated to you or do you have any knowledge as to why you're not strip searched?

A I would assume on account of my condition.

* * * *

[1210] MR. YOUNG: All right. I would offer Petitioners' Exhibit 134 into evidence at this time your Honor.

MR. SCHAFFER: No objection.

(Petitioners' Exhibit 134 was received in evidence.)

Q Dr. Seiller, you testified that you can order coins for use in the phones and to purchase newspapers from the commissary, is that correct?

A Yes, within the $50 spending limit.

Q Do you normally spend the total amount that you are permitted to spend in any given week?

A I think your question would lead to a misunderstanding. You have a spending limit of $50 a month. There is actually, the maximum you can spend out of this $50 is $15 a week. In other words, you can actually buy only about three weeks and the last week you don't have much money left. I spent the money within my limits, but sometimes it happens I ordere for $15, not knowing correct prices, I may be over, I may be under, but I spent my $50 during the month.

* * * *

[1212] Q Any other things that you can think of that aren't available at MCC?

A There is no comparison qetween the state commissary list and this one. You cannot ocmpare the two. It's a complete different thing. It simply is completely different, the commissary itself.

Q How is that different?

A I can only talk about the State of New York because I was working there. State purchases are centralized. Various institutions draw on a central contract. The prices are certainly relatively low and they don't need high stocks because they can immediate delivery of items throughout. Here we have frequently items are sold out and they are not replaced for two, three weeks. And then the offer is—more items are offered.

Q All right, Dr. Seiller, it's been stipulated between the parties that persons cconfined at the Metropolitan Correctional Center can only receive food packages on Christmas and I believe religious holidays, certain items can be received from outside. Would you describe the effect on you of not being able to receive such packages?

A I think it's—first thing, the receipt of [1213] packages is not so much of receiving items. I think it is more or less a symbolic affair. Someboy who sends you a package has to think about you, he has established some sort of relationship, which for me is more important than the items in the package. But I certainly would like to have certain items, like vitamin tablets or other things I cannot buy from the outside.

Also, I think it would have a positive effect on the commissary because right now I have no means of comparing prices but I think some of the things are rather high in price.

MR. SHAFFER: Objection.

Q On what do you base that?

THE COURT: All right. Well, I don't think it amounts to anything, although I think I will receive it for his impression of the situation, not as proof that the prices are high.

Q Dr. Seiller, prior to your incarceration did you use an electric shaver?

A Yes.



Q And did you use one in the state prison?

A Yes.

Q Were you permitted to possess your own [1214] electric shaver in the state prison?

A You were actually encouraged to have electric shavers because they did not want razor blades around there.

Q I think the parties will stipulate that you are not permitted to have electric shavers at MCC.

Dr. Seiller, are you permitted to have a typewriter in the state prisons?

A Yes.

Q Did you have your own typewriter when you were in the state prison?

A Yes.

Q Were you permitted to have your own stationery in the state prisons?

A You could have stationery with only your name on it. For using the address, you had to use the address of the prison without mentioning it was a prison.

* * * *

[1509] Q Other than the problem of not gaining a chance to supervise the clean-up because of visiting, were there any other problems that were created by the fact that you were the only officer in charge of 120 men?

A Yes. It was sort of hard to walk back out into the unit and answer the questions or help them with the problem at that particular time because of trying to find other inmates for visits or checking the locator to see where they were if they didn't answer when you yelled out at the top of your voice for a certain name has a visit. It was a problem, yes.

Q All right. Officer Norman, as one of your functions concerning visits, were you responsible for conducting strip searches of inmates?

A Yes. There again I didn't—

MR. SCHAFFER: Objection, your Honor.

THE COURT: The answer is just yes, officer.

Go ahead. Next question.

Q Did you always conduct a visual rectal search [1510] as part of that strip search?

A Coming out, if I suspected something, I would. But normally I would allow them the dignity of not resorting to that on all occasions.

Q All right. On the occasions that you did conduct a visual rectal search, taking all the times that you conducted a visual rectal search while you have been employed at MCC, have you ever discovered any contraband hidden in that area of the body?

A Never.

* * * *

[1517] Q Officer Norman, has one of your responsibilities as a member of the MCC staff been to conduct periodic room searches?

A Yes.

Q And when you have conducted such a search, has the inmate been permitted to observe the search?

A No.

Q Have you always returned the rooms that you [1518] searched to the condition that they were in before the search?

A I always try to.

Q Have you observed whether other officers have done likewise?

A Yes.

Q Do they return the rooms to—

A Not all of them. A lot of the officers do try to put it back into shape, not all of them.

Q What about the ones who do not? What condition do they leave the rooms in?

A Well, the room looks very disrupted once they get through with the search.

Q In what fashion?

A Leaving personal property and bedding scattered over the room.

Q Have you observed a superior or a lieutenant instruct these individuals to return the room to their original condition?

A No.



Q Officer Norman, in the course of your responsibilities at MCC, have you ever observed inmates attempt to bring coins in from the visiting room?

A Yes.

* * * *

[1673] Q Now I'd like you to assume, Dr. Fogel, that when searches were done of the inmates' rooms at the MCC it is a practice in the Metropolitan Correctional Center not to allow inmates to observe those searches.

Do you have an opinion as to whether or not that is a suitable correctional practice?

A Unless the person is out of control at that moment I would, I would let him observe. I don't think it's suitable not to. I mean I think he should observe what is being searched in his room.

Q Why do you say that?

[1674] A Well, I think, you know, we're the agents of law and we convey the meaning of the sanctity of private property. You don't go rampaging through. You collect what you believe is contraband. You inventory it, make an inventory of it, and give a receipt for it. That's how you would convey lawful behavior.

Q What's the effect upon the inmate if you don't allow them to watch the search?

MR. CORSI: Objection, your Honor.

THE COURT: Sustained.

* * * *

[1751] Q What is your opinion?

A That an inmate should be allowed to observe or be in very close vicinity to his room when his room is being searched. Too often correctional officers will search the room of an inmate and the inmate will state that the correctional officers placed some contraband in there. They produce the contraband or the inmate will claim that he had some article inside of his room which was not contraband which the correctional officers stole or the inmate will claim that the correctional officers came into his room and purposely broke some pieces of furniture.

By having the inmate close to his room the inmate is accountable for what the correctional officers find in there immediately.

Correctional officers can question the inmate on any question they have concerning what the contents of his room are and it doesn't allow for that kind of situation which I described to happen.

Q Have you formed an opinion as to whether having an inmate observe searches of his room would create a security risk?

A Yes.

Q What is your opinion on that?

[1752] A It doesn't create a security risk.

Q On what do you base that opinion?

A Let me say it is less of a security risk than not having the inmate present. If the inmate were not there, you are creating an opportunity for all kinds of repercussions. Having the inmate and having two correctional officers go into the room does not produce an infraction of security. It rather contains the search and prevents it from being a huge incident.

Inevitably in a prison the inmate will get word sooner or later, not from the correctional officers that his room is being searched, but from other inmates. That inmate then becomes paranoid and figures out some way to get back to the room or immediately begins to suspect what could be going on inside during that search, and creates an unnecessary suspicion. It could be a self-contained search.

* * * *

[1885] Q What, if any, steps have been taken by the MCC to reduce the population at MCC?

A Well, we have examined several possibilities and alternatives to reduce the population ever since we first began to note that it was rising above our capacity.

One of the things that we did, Lewisburg Penitentiary in Pennsylvania used to run a bus service through the MCC and it used to come in about three or four times a month. We converted that bus so it no longer held those prisoners as holdovers at our institution and had them



run directly instead to places like Petersburg, Danbury and other facilities. They now come in once a month.

In addition to that, in May or April of '76 we acquired—petitioned the Central Office for a bus and acquired our own bus so that we can move as [1886] expeditiously as possible people out of the center. That bus was an older bus, it had 22 seats, and around December of '76 we received another bus that has 27 seats, giving us even more capacity to move people.

In addition to that, we increased our space at the Community Treatment Center from about 145 to 160. We have contracted with other private halfway houses in the area to give us additional bed space in community programs. We made arrangements, working through the judges in the Southern and Eastern Districts of New York, and were able to transfer weekenders, people serving their sentence on weekends, to halfway houses, with the exception of about two cases.

We also reorganized our administrative systems section of the institution, which deals with receiving and discharge, bus transportation and so forth, for greater efficiency and determining when a judgment of commitment is received.

I recruited and hired a man who was a U.S. marshal for Baltimore to work in the marshal's service in trying to expedite the handling judgment and commitment papers from the courts, and so forth, so that we can move people just as rapidly as possible.

All these things have been done in an [1887] effort to try to keep population within a reasonable limit.

Q With respect to the MCC bus, how often does that bus make runs from the MCC?

A We have regular runs about three times a week, depending on which week we are operating in. But we also have blanket permission from the Central Office to run whenever necessary. So we have often run more than three times a week. We sometimes run as much as five times a week.

* * * *

[1947] Q What is the MCC policy concerning room searches?

A Well, each—each employee, correctional officer, unit manager, counselor, all employees are required to do periodic searches and to monitor for contraband and for any other kind of security breach that could jeopardize the safety of the institution and the staff and inmates.

We, each correctional officer on the unit, must search a certain number of rooms a week. That's part of his responsibility. I don't think they necessarily mind if the inmate is there, but he doesn't have to be there when the room is searched.

Q With respect to these searches are inmates permitted to watch them?

A Under those circumstances where an individual search of the room is being done an inmate can stand and watch as long as he stays outside of the room. Under a more structured search of rooms, and we do have [1948] a unit that goes through certain segments of the institution on a weekly basis, they cordon off the area, and go through all the rooms. Under those circumstances no inmates are allowed inside that cordoned-off area and the reason for that is to prevent inmates from distracting officers who are doing the searching and moving contraband from one area to another ahead of the search.

Q Are there other reasons for cordoning off the area?

A The other consideration is that during searches there sometimes arises a situation in which the inmates become argumentative and conflicts do develop between staff and inmates over the search. I might point out though that staff are instructed to leave the room as they found it and they are provided with training during their on-the-job training during their initial assignment with the Bureau of Prisons and their probationary year, ongoing reminders about the way rooms ought to be searched, through our regional training centers.

I think it is important to preserve as much as possible the privacy and respect the privacy of the inmate.

[1949] Q It has been stipulated that inmates are not permitted to receive food packages except on special occasions, particularly the holiday season. What is the rationale for this policy?



A Well, inmates are not allowed to receive food packages again, because of the possibility of concealing contraband, drugs and even weapons. Food items that come into the institution, especially if they come directly from the family.

The other problem associated with allowing food into the institution has to do with the amount of staff time necessary to inspect it, No. 1; and, No. 2, sanitation, storage problems, the result of having a large amount of food around.

Q Are the problems concerned with theft or fights?

A That's another consideration, that there is a person who may not have a family or friends to bring food in and other individuals do, and I might add that that's a consideration of personal property in all kinds of things that are available to inmates that we try to narrow the gap between the haves and the have nots to avoid conflicts, the possibility of using personal property and food items and so forth for buying favors [1950] and gambling and strong-arming and other kinds of activities that have been written about in books for years and have always caused correctional administrators problems.

MR. YOUNG: Your Honor, we're trying to avoid objecting as much as possible, and give respondents wide latitude, but questions like the ones that Mr. Corsi just asked are very leading. I just request that—

THE COURT: I didn't think it was very leading at all.

MR. YOUNG: He asked about fights and then the answer came back, yes, there are fights.

Q With respect to the limits on personal property what is the rationale for that property?

A Mr. Corsi, some of the same rationale applies again, it widens the gap between the very influential kind of people and we have a number of people who are very influential in our custody and they would be able to buy nice-looking clothes and nice-looking personal items and so forth and the people who do not have those

items would not be able to purchase those, and again creates conflicts and problems and fights and theft, and also again creates storage problems and so * * *

[1951] As far as clothes are concerned I think especially in an institution such as we operate, where there is such a rapid turnover, if we allow inmates to wear their own personal clothes, identifying them as inmates would become extremely more difficult and it is just one other area of prevention in terms of preventing an escape that would be taken away from us. By that I mean that a uniform readily sets him apart, sets him aside. If he is going to escape he had to get rid of that uniform and somebody has to bring him in some civilian clothes, which makes it just that much more difficult to escape. So the personal clothes, in addition to being storaged and theft and contraband problems, and also the escape problem, are a security problem.

Q What is the rationale behind the $50 limitation per month for inmate spending at the MCC commissary?

A The same rationale again is used that there are some inmates who have a great deal of money and others who don't. And if you are allowed to spend any amount of money in commissary, you could then purchase commissary items that could be traded * * *

* * *

[2271] Q Would you describe the procedure by which paperbacks are brought into the MCC and distributed to the floors?

A Well, insofar as it comes under my auspices, we have a contact with Hudson County newspapers, I forget what the name of the company is, Hudson County, Hudson County News—that's what it is—and it's in Jersey City. And every, say, month or six weeks we go out there and pick up stripped paperbacks, which is simply a process where the publisher or the distributor, rather, strips the covers off the paperback books and declares them ready to be thrown out, and agencies such as prisons and hospitals go out and pick up books under those circumstances.

Q Approximately how many books do you pick up?



A Sometimes 3000, 4000, sometimes 2000, 1500, depending on what they have got available at the time.

We are really at their mercy, so to speak.

[2272] Q And after these books are picked up, what do you do with them?

A Lay them all out over the floor of the library and any rooms that are available, the hallway and whatever, in piles of—set up to indicate what is duplicated and what is not duplicated, and then we bring them up to the units and switch as many books as possible—there are leftovers from previous distributions—and try and continually refurbish the racks of the paperbacks up there.

We don't control them in any way. We encourage people to keep them.

Q Do you also have responsibilities with respect to the introduction of magazines other than those that inmates themselves order, subscribe to or have brought in by friends?

A Yes. We get them from the General Post Office on 33rd Street and do that every two or three weeks, depending on if I have the time or if the Post Office has enough magazines. We call before we go.

It is like the Dead Letter Area, and they have bags of magazines that they assign to the many agencies in the city that go and pick up whatever magazines are available to be picked up at the time.

[2273] And we are, again, at their mercy to the extent of magazines that are available or whatever. We usually get a minimum of five bags. But in our building, the way it is, five bags isn't a whole lot. The place is like a sponge.

There are 13 places where magazines have to go when they get distributed, and what happens is we just break them into piles and try and provide as little duplication as possible, and whatever we've got we give out.

Q What about newspapers? What are your responsibilities with respect to newspaper distribution and sales?

A We sell them: daily New York Times, daily Daily News, daily El Diario, and the weekly Amsterdam News. They are sold through us.

We also handle the Sunday Daily News and the Sunday Times and the Saturday El Diario, which is the same as the Sunday paper.

Q And how are these distributed among the floors?

A An inmate goes around and sells them, face value.

Q Does he start in one particular floor each [2274] day and proceed in a certain manner on each day?

A Well, he starts on the 11th floor on one day and on the 3rd on the next, and it reverses each day.

Q Are you also in charge of the general library?

A Yes.

Q Did there come a time when an inventory was taken and a list of books printed up?

A Yes.

Q When was that?

A Late January it was all completed, mid-January.

Q 1977?

A Yes.

Q And what did you do with that list after it was completed?

A Ran it off on a Rexograph machine and issued one to each bulletin board on the units and one to each unit manager.

Q If an individual wishes to borrow a book from the general library, what is the procedure for doing so?

A The unit officers have general library cop-outs which are simply request forms with spaces in them indicating what they want, and they put them in the envelope on the Bulletin marked Law Library, and the * * *

* * * *

[2372] Q It is further stipulated that after a visit, a strip search is conducted of inmates. Do you have an opinion as to whether the use of strip searches after visits is in conformity with accepted correctional [2373] practice. It is if, one, the visits are contact visits, I mean where there is direct contact between the visitor and the detainee or inmate, and also if it is done in private as opposed to in front of everybody, and also taking into consideration the fact that you have people in a facility, whether it is this one or another one, that



might wish to introduce contraband, if you have people that are involved in narcotics or serious offenses that might want to introduce something to aid them in the escape.

I think it is a precaution that needs to be taken.

Q Dr. Camp—

THE COURT: Do you include in a strip search an anal inspection and inspection of the genitals? Was that embraced within your answer?

THE WITNESS: Well, I'll try to phrase it diplomatically.

THE COURT: No. I can listen to everything. It is all right.

THE WITNESS: A visual as opposed to any other type, just a visual inspection.

THE COURT: And it is your expert judgment that that is necessary following contact visits in [2374] guarded visiting rooms?

THE WITNESS: Yes, because, your Honor, I don't think it is possible to watch every single person that closely so that contraband could not be passed.

THE COURT: Is it your experience that a fully-dressed inmate in a visiting room could feasibly or with any frequency secrete contraband in the recum or something like that?

THE WITNESS: Absolutely. I know of cases where it has happened. It does not stop, your Honor, and would not stop somebody swallowing something, whether it passed in a balloon and swallowed something in a balloon and then passing it later, when they get back in the unit.

THE COURT: What kind of search would you recommend ror that?

THE WITNESS: I don't think there is a search. I think that's where observation needs to be as good as possible. And if you do find that later something has been brought in that way, then restrictions for that person on their visiting have to be put into place, where they have not, you know, respected the fact that contact visits are allowed they have abused that privilege and therefore noncontact visits, at [2375] least for a

period of time, might be instituted. Or that person who visited that day would no longer be permitted to visit.

THE COURT: When you suggest making discriminations among people, do you have any view on whether that might be done generally in advance without regard to discovery of infractions?

THE WITNESS: I don't think that that should be done without having something actually occurring.

THE COURT: Well, do you think there might be a class of inmates, based on the nature of the crime or the person, for whom the anal inspections would not be necessary?

THE WITNESS: I think that is the case, although we know from experience that if you really want to get something in a prison, you will not be the person who will bring it in, you will have somebody else bring it in for you through the visiting room who the administration is less likely to see as desiring to have that item. So you use somebody else to get that in.

I guess that's the best way I could respond to it.

But certainly there are some people that [2376] are far less likely to bring things in. But they might be induced, pressured, subtly or not so subtly, to do so.

But again I would say that if somebody wants to get something in, whether it is this facility or somewhere else, they can find a way. I have used the analogy you can bring in a Sherman tank piece by piece. I think it is amazing that more contraband does not come in than does.

* * * *

[2379] Q It is stipulated that for formal unit [2380] searches, room searches, inmates are not generally permitted to watch the search of their rooms and that on other occasions, during less formal kinds of searches, they be permitted to do so.

Do you have an opinion as to whether that policy is in conformity with accepted correctional practice?

A Yes. I think basically it depends the type of search and the reasons for the search.

In many instances, if the detainee or the inmate is present, is in the area, it is certainly desirable for him to be there and to observe what is being searched, what



might be being picked up as contraband, what is being noted as contraband.

On the other hand, it might be, because of a tip that you have or because you know the nature and personality of the individual, it might be very sound not to have that individual present, because it might be a situation that could become explosive, it might antagonize him. It would be better to do the search without him there and then come back in private rather than out in public in front of the other inmates and go over what was taken.

I observed a search on one of the floors [2381] and I thought it was done very well in terms of the rooms were put back in order, the material was noted. They searched eight rooms. Two of the inmates, detainees, happened to be present. They observed it. And everything was put back in good order.

Certainly the people who were searching knew I was there. I don't think that they knew that I was there to testify in this case and were putting on a show for me. And I thought it was done—* * *

* * *

[2414] A Would you repeat the question?

Q Yes, sure.

It is true, isn't it, that personal property that an inmate possesses while he is in detention has importance to him?

A Yes.

Q And probably a heightened importance to him from what people in the general population feel about their property?

A You mean outside the prison?

Q Yes.

A Equally so.

Q Now, in your experience in the federal system and in New York City and in Missouri, did it ever occur that property that was taken from an inmate on a search was improperly seized, that is to say, that property that a guard thought when he seized it, maybe in good faith, was contraband that later turned out was not contraband?

A Yes.

* * * *

[2434] MR. SHAFFER: Miss Cardamone.

---

ELISSA CARDAMONE, called as a witness by the respondent, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHAFFER:

Q Miss Cardamone, are you currently employed?
A Yes, I am.
THE COURT: You know by now that Miss Cardamone and I are old friends.
Q Are you a correctional officer at the MCC?
A That is correct.
Q How long have you served in that capacity?
A Almost four months.
Q What units have you worked on?
A Unit 3 and Unit 5.
Q Miss Cardamone, in the course of your duties as a correctional officer at the MCC have you had occasion to conduct strip searches of female inmates after visits?
A Yes, I have.
Q In the course of those strip searches have you discovered contraband?
A Yes.
[2435] Q Could you relate any instance or instances in which that occurred?
A I was strip searching a female and I noticed in the vaginal orifice of the female inmate a reddish object.
When it was removed and she subsequently removed it herself, it was discovered to be a red balloon and in the balloon was a packet of heroin, a nickel's worth.
Q Because of your duties as a correctional officer on Unit 5, have you had occasion to have a woman locked in?
THE COURT: How long have you worked there, did you say?
THE WITNESS: Almost four months, three and three-quarters.



Q Was this the only instance where you discovered contraband?
A I found contraband lots of places, lots of times, when you least expect it, it is just there.
On one occasion I saw a guy toss a small brown paper bag which I intercepted and it was filled with marijuana.
Q Was that in a visiting room?
[2436] A This was in a range, tossed it to a general purpose area. It was being tossed to another inmate and as we were approaching the range for the purposes of conducting a search for contraband and as we were entering on the range going up the steps, this man stepped out of the room and tossed the bag to another inmate and I just did one of those jobs (indicating).
Q You caught it?
A Yes.
Q Can you recall any other instances in which you discovered drugs?
A I found some coke once in an aluminum foil in an inmate's room; marijuana here and there.
Once I found one seed, sometimes you find a lot, sometimes a little.
Sometimes you find a dusty residue from it. Once I found a dusty residue of coke, binoculars.

* * * *

[2440] Q You testified as to strip searches and your discovery of marijuana in the vagina on one occasion.
Have you ever on any other occasions discovered contraband hidden in the vagina or the anal area?
A Yes. I got beat for that once. This woman had something in her and was giving me a hard time, sort of scaring me because I am like meek to be doing this sometimes—so that I locked her in the search room and called for help, for assistance.
And as I was doing that, I was keying the door because the count was about to start and to see if [2441] someone was there and my keys got stuck in the door.
Now, I was faced with do I go over, as this was happening I was with my key stuck in the door and I see

this thing coming from under the door of the room and the woman suspect has something in her.

Now, I am struck with the problem do I run to the door and pick up what is being passed out from under the door to another inmate or do I leave the institution keys hanging in the door that is jammed in? I don't know what to do.

I figured if I get beat I will get yelled at but if I mess up with the keys I would get fired so I stayed with the keys.

Whatever it was, she evidently took it out and passed it under the dor and someone else got it. Later in the evening they all wanted Malox so it turned out okay.

Q You never actually determined what it was?

A No, I just know it was something that needs to be passed under a door.

Q At the time of that predicament you described was another officer nearby who could have assisted you in regard to the keys and this room?

A No, because the range I was on didn't have a [2442] phone on it. I didn't have a walkie-talkie.

Q Were you the only officer stationed there at that time?

A Yes, at that time.

Q By the way, you testified as to finding grass and coke. I assume they weren't in the vagina or the anal areas except in the instance you described?

A No.

Q Do you have any knowledge as to where those items come from?

A No.

* * * *

[2545] Q Mr. Richardson, you testified concerning certain visiting procedures.

Is one of your responsibilities as an officer to conduct strip searches of people?

A Yes, sir.

Q Relative to visiting?

A We conduct strip searches on inmates when they come out of the visiting room.

Q Do you do this to women or just men?



A No, we don't strip search women, we have a woman do that.

Q You do it for men on the fifth floor North most of the time?

A 5 North and on 3, yes.

Q When you conduct strip searches of persons is that a search only of the individual in the room with you or are there usually several inmates there at one time?

A I like to have at least maybe two or three of them in there because a lot of times we have quite a few visits and if we took them one at a time we would never really get done.

Q In other words, you search several people at the same time?

[2546] A At least three.

Q Have you ever worked on the third floor?

A Yes, sir.

Q Have you conducted strip searches there?

A Yes, sir.

Q Have you ever stated to an inmate that you would kick his ass?

A Did I say to an inmate I was going to kick his ass?

Q Have you made that statement to an inmate?

A Maybe, I don't remember. I don't recall.

Q Did you ever make a statement to an inmate during a strip search that "You are nothing but a fuck'n punk and I ought to bust you in the face?"

A I don't recall.

Q You don't recall whether or not you made it?

A No, I don't.

Q Did you ever tell an inmate on 3 North that they were being locked in their rooms at night because of the Wolfish suit?

A No.

* * * *

[2603] Q The MCC policy with respect to room searches, and this has been stipulated to in this case, is that during a formal unit search inmates are generally not permitted to view the search of their rooms and that

during less formal searches of rooms, inmates may be permitted to observe such searches.

Do you have an opinion as to the acceptability in terms of correctional practice and standards of this procedure?

A Yes. My opinion is that that is in keeping and accordance with acceptable operating procedures and practices in detention institutions.

Q What factors underlie that practice and policy in detention facilities?

A Again, it is a matter of the degree of security required. In terms of a formal search which would include an in depth type of search of a given area, as contrasted to an occasional search or spotcheck basis or for some particular reason of a single inmate's room [2604] or cell, the requirement that prisoners not be in the immediate area obviously has its basis again in the requirements of security.

It is quite obvious that if a group of officers start a searching process of a housing area at the MCC, if it be a corridor or an area of rooms or in a typical jail if it were a cell block, unless all prisoners are removed from that immediate area, there are a wide variety of opportunities for the confiscation of contraband by prisoners who may have such in their possession and cells.

It can go down the toilet or out the window, swallowed, a wide variety of methods of confiscation of contraband.

Therefore, primarily for security reasons and primarily for the control of a searching process so that prisoners are not constantly gathered around a particular inmate's room or cell to see what is going on, common practice dictates that a group search should be conducted in that manner.

* * * *

[2605] Q It is stipulated that at the MCC inmates are generally not permitted to possess personal property except for a limited number of items like a wedding band and an inexpensive watch or radio purchased at the commissary;

Except on special occasions inmates are not [2606] permitted to receive packages of either personal property or food packages from outside the institution.



Do you have an opinion as to whether these practices are in conformity with accepted and good correctional practice?

A Yes. It is my opinion they are, they do conform to accepted correctional practice, particularly insofar as detention institutions are concerned.

Q What is the basis for your opinion?

A Well, there are many bases for that opinion. There are many reasons for it, not the least of which again is the item of the whole overriding, overall factor of security.

Again, there are many personal problems that arise, many that may or may not be directly related to security and in some respect quite comparable to the matter of visiting that we just discussed.

First of all, the possession of a wide variety of valuable items by an inmate opens up obviously the possibility of theft of those items by other inmates and in rare occasions perhaps by unscrupulous employees or whoever there may be in the immediate area.

I can conceive of a person coming in with an expensive diamond ring, for example, and being permitted [2607] to retain that ring during the course of his incarceration.

This would be quite foolhardy it seems to me on the part of a jail administrator to permit that kind of practice. The first thing that arises is, as I have said, the matter of theft possibility.

You then have the possibility of many other inmates who have no possessions or very, very limited possessions, least of all a diamond ring or an unusual amount of money or an expensive watch or what-have you. This creates again a series of what we might call human problems, you have it and I don't, and that always creates a very difficult situation in the close living that would be experienced in a detention unit.

I would certainly not be in favor of an unlimited privilege of having unlimited personal possessions.

It seems to me too that is in the area of the protection of the inmate. We are protecting him, in the sense we are precluding the possibility of theft of that piece of valuable property.

Q With respect to receiving packages either of personal property or food packages from outside the institution, is the prohibition on the receipt of such items in conformity with accepted correctional [2608] practice?

A I would say generally yes, that is in conformity. In my opinion again we operated in that manner, limiting packages to a certain time of year, for example the best illustration is the Christmas period.

Limiting the contents of those packages to items of necessity.

It seems to me too if the jail administrator permitted the admission of unlimited food items, for example, most of which would be in the form of cooked or baked goods probably or raw material such as meat, uncooked foodstuffs, that this immediately serve to create an ever increasing problem of sanitary control, providing for perhaps rodents, mice, insects, roaches, problems of pest control.

Q What if any secure problems would be associated with the receipt of packages?

A Probably the most common problem of the admission of goods, whether it be the traditional file in the cake kind of situation that is well known to probably everyone, probably more important and a more practical kind of problem that exists certainly in metropolitan areas is in the introduction of prescription medications, narcotics, marijuana, et cetera, that can [2609] be introduced for example in heels of shoes, seams of clothing.

I think the jail administrator today—certainly I have experienced at least the limited introduction of contraband by those various devious methods and this simply provides another opportunity for the breakdown of security in an institution.

Likewise, the reverse of the coin is as we have said in the case of visitors and cash and personal belongings, it creates the age-old problem of you have it and I don't have it. I don't think this needs any further elaboration.

Q It is also stipulated in this case inmates are permitted to spend up to $50 per month at the commissary and within that $50 per month limitation, on a given



weekday are permitted to spend up to $15 of that $50 limit.

Is this spending procedure—have you formed any opinion as to whether this spending procedure at the commissary is in conformity with accepted correctional practice?

A Yes, I think that is a reasonable procedure, a reasonable amount of money in general.

* * * *

[2643] A I would say that particularly in long-term institutions medical detectors are probably in routine use.

Of course, we can break down metal detectors by whether you have in mind the airport-type of detection device such as is at the MCC or whether you do it by the hand frisk.

Q Using both, aren't there many in detention facilities?

A Yes. I have only used in my experience the hand frisk type.

Q Is it your view—isn't it true that those detectors are sensitive enough to pick up metal objects that an inmate is secreting on his clothing or on his body?

A Well they are, yes. This depends on the delicateness might be the word of the particular device.

I am sure as you well know you could walk through one of these devices and not have the flashing red light and the next walk through and it would.

Q But that could be controlled?

[2644] A Apparently, yes.

* * * *

[2738] Q Specifically, in reference to your mention of security needs, I would like you to assume that after a family visit or social or legal visit, an inmate is brought into a shakedown room where he is asked to remove his clothing and the clothing is searced and the individual is given a visual strip search, which includes opening his mouth, raising his arms, bending over and exposing his rectal area.

Do you have an opinion as to whether this practice imposes a level of stress upon inmates such as to compromise their mental well being?

A Yes, I have an opinion. Essentially it is that in my awareness, both talking with staff and others, that this becomes a kind of automatic, objective process that is accepted by the parties concerned as something that is part of the system and may not be liked, but I am not aware of any irreparable damage to a person's psyche which is done by such a process.

* * * *

[2740] Do you have an opinion as to whether this practice imposes a level of stress upon inmates that would compromise their mental well being?

A I would answer that in the same way that, yes, I have an opinion, again with the proviso that while this is something that may not be wished, that it is part of the reality of the circumstance in which it is not only appropriate from a standpoint of the institution's security, but is something to which people can adapt and recognize and I would doubt that anybody was so severely upset by such an experience that they would require psychiatric care or, again, that there is a question of after effects of it.

To the degree that one has something to hide it can be very unsettling but you are introducing then another variable.

* * * *

[2767] BY THE COURT:

* * * *

A Well, except I don't know that the—it is clearly a matter of, the question is when you are talking about rectal searches, it is my understanding that they don't do rectal searches here; they do observation.

Q Whatever you call that, whatever that is, the spreading of the buttocks.

A That's anal inspection.

Q That inspection, and that's what I am asking you about, what security objective does that serve, based on your experience in penal institutions?

A Well, the primary security is to try—the only thing would be if there were a bag of something, some evidence of something which was still protruding from the anus.



Q But what do you mean by that?

A A bag—

[2768] Q Narcotics?

A Yes, primarily drugs.

Q That's what you mean by security?

A Yes.

Q You don't mean weapons or threats—

A No. I'm sorry. Drugs.

BY MR. MUSHLIN:

Q Isn't it true as a doctor, doctor, that if someone were to secrete something past his sphincter muscle in his anus or, I think, rectum, whatever, it wouldn't be observed on a visual inspection?

A The odds are that it wouldn't be discerned, be seen.

Q Regarding the people who have been diagnosed as mentally ill who are held on 9 South, you don't know, do you, whether or not any of those have been diagnosed as dangerous to others or themselves?

A I don't know. I didn't assess individual cases.

Q You didn't do any in-depth psychological interviews with anybody at the MCC, did you?

A No.

* * * *

[2860] Q Mr. Carlson, do you have an opinion as to the appropriateness from a correctional standpoint of visiting within the living units at the New York MCC?

A Do you mean inmate visiting on the unit—

Q I mean family or visiting inmates within the living units?

A I would think it would present a very serious custodial problem and also would deprive the other inmates to access to the multi-purpose areas if they were used for visiting.

Q Mr. Carlson, do you have an opinion as to the appropriateness or necessity of a strip search procedure after contact visits, including a rectal examination?

A Yes, I think if you permit contact visits in an institution such as the MCC, you must require a strip search in order to prevent the introduction of major contraband into the institution.

Q Is this a standard practice throughout the Bureau of Prisons?

A In all our Metropolitan Correctional Centers and a vast majority of the institutions it is required.

Some of the minimum security camps or treatment centers obviously have the option of not using it under [2861] those circumstances but those are a different type of institution and offender confined there.

Q Does the requirement of a strip search procedure a deterrent to the introduction of contraband?

A I believe it is.

THE COURT: What do you base that on?

THE WITNESS: The volume of contraband that is introduced into institutions is at a fairly low level. I have never, of course, worked in the State system that didn't provide a strip search but I think based on our experience there must be a deterrent effect or we would have a tremendous volume of contraband, drugs and other type of contrabands introduced into our institutions.

Q Is it your view, Mr. Carlson, that if the strip search procedure is to be effective it has to be automatically applied to all inmates?

A Yes, I think if we are going to segregate out one group only for the strip search they are putting pressure on the other inmates and they can intimidate them to bringing in contraband items knowing full well that the other group may not be subject to the same degree of physical search.

* * * *

[2863] Q Are there any security problems associated with allowing inmates to bring in clothing of their own?

A Very definitely narcotics, currency, other contraband could very easily be secreted in the lining of coats and hats and other apparel and we have actually detected a considerable amount of contraband from my personal experience in the lining of clothes, for example.

Q Mr. Carlson, what is the basis for the Bureau of Prisons policy restricting the possession of personal property to those items which are either issued by the institution or can be bought in the commissary with a few [2864] exceptions, such as shoes, socks, wedding bands and a religious medallion?



A The primary one is security. The property which can be brought in obviously presents the likelihood or possibility certainly of the introduction of narcotics, currency, weapons—narcotics primarily.

Q What is the basis for the restriction on personal property?

A Again, the amount of physical space available in the institution certainly is a consideration and, again, the have and the have nots issue, trying to treat all inmates as equally as we possibly can is certainly another consideration.

* * * *

[2890] Q Isn't it true that the federal system has a urine analysis test which they can determine whether drugs are becoming a problem in the institution?

A Yes, they do.

Q Do you know whether those have been used at the MCC?

A I don't know if they have at this point in time. Our full policy goes in effect on April 15 which requires all institutions using urine analysis.

Q Wouldn't that be fairly effective in determining whether drugs were becoming a problem at an institution?

A It would be not only another deterrant but a way to measure the impact of the problem.

* * * *

[2957] Q Dr. Bowen, I would like you to assume that there are periodic searches of rooms and dormitory areas at the MCC and that on some occasions but not all inmates may be permitted to observe the search?

But that on other occasions they are forbidden from observing the search of their room or dormitory area.

Do you have an Opinion as to whether this practice creates intolerable stresses upon the inmate's well being and in particular with respect to their secondary needs for privacy?

A No, I don't think it is intolerable, with the same kind of proviso I went through in answer to your previous question, namely, that it should be a rational pro-

cedure, equitable, no inmate should be picked out for [2958] special searching except with due cause;

And that is a procedure that can be seen to be within our culture and to be part of the ordinary operation of the institution.

* * * *

[2972] Q What's your position?

A Senior correction officer.

Q How long have you held that position at the MCC?

A A year and a half.

Q In the course of performing your duties as senior correctional officer have you had occasion to conduct strip searches in the shakedown room after visiting hours?

A Number of times, right.

Q On those occasions have you ever found contraband?

A Many a time, right.

Q Can you recall on approximately how many occasions you found drugs as a result of the strip search?

A Oh, about six times.

Q Can you describe any of those instances?

A Well, one is—call the name out?

Q No, you don't need to specify the name of the inmate; just describe when it occurred and what happened.

A Well, one of my visits I caught drug coming through in a pile of cellophane through one of the inmates [2973] toe of his shoe, and twice I have caught it coming through under the middle of a shoe like inside of the sneaker, the whole inside pulled out and stuck up under the bottom.

Q On any other occasions have you discovered drugs?

A Yes. They were bringing it in like in plastic envelope-type and just close it right in your jacket pocket like this, stuck down inside.

Q Have you had occasion to find contraband other than drugs?

A Coins.

Q On approximately how many occasions have you found money?

A A number of times.



Q Any other kind of contraband besides money or drugs?

A No.

MR. SCHAFFER: Thank you, Mr. Lattimore. No further questions.

## CROSS EXAMINATION

### BY MR. YOUNG:

Q Mr. Lattimore, I'm Mike Young. I'm representing the inmate petitioners in the case.

[2974] A Yes.

Q Mr. Lattimore, whenever youi conducted strip searches have you always conducted them with only one person in that airlock area at a time?

A One person at a time.

Q You have never had more than one person in there?

A No.

Q Have you ever found drugs or any other type of contraband secreted in the anal area?

A I didn't hear that word.

Q In the anal area, when the person bends over to spread his cheeks?

A No.

Q Have you ever found drugs or any other type of contraband secreted around the genital area?

A No, not on his body that way.

MR. YOUNG: No questions, your Honor.

MR. SCHAFFER: I have nothing further.

THE COURT: All right. Thank you, Mr. Lattimore.

(Witness excused.)

PET. EXHIBIT 11a

[U.S. Dist. Court, S.D. of N.Y.]

MAGAZINES ON BOOK SHELF—3/8/77

| | Amt. of Magazines |
|---|---|
| January 17, 1974 | 1 |
| Spring, 1976 | 1 |
| February, 1976 | 1 |
| April, 1976 | 1 |
| May, 1976 | 1 |
| July, August, 1976 | 1 |
| August 23, 1976 | 1 |
| August, 1976 | 2 |
| September, 1976 | 2 |
| September 13, 1976 | 1 |
| November 8, 1976 | 1 |
| November 15, 1976 | 1 |
| December, 1976 | 1 |
| January, February, 1977 | 1 |
| February 5, 1977 | 1 |
| February 19, 1977 | 1 |
| February 26, 1977 | 1 |
| March 5, 1977 | 1 |
| Winter, 1977 | 1 |

Witnessed by Mr. T. Whitehead, C.O.



PORTIONS OF GOVERNMENT'S EXHIBIT #RX-QQQ

The Bureau of Prisons now proposes to construct a new facility which will not only provide detention facilities, but also provide a wide range of other correctional services. Planning funds in the amount of $300,000 were provided in the 1966 appropriation in order to initiate the project but until a few months ago persistent efforts to acquire a site were unsuccessful. Now negotiations are underway for a specific site and construction could be started in 1971.

The new facility, to be designated the New York Metropolitan Correctional Center, has been planned as a multipurpose complex wherein full correctional services will be provided to better serve the community and the courts. The basic design considerations and related center components are described in the following paragraphs.

--Provisions for detention of people who are awaiting trial, and for those serving short-term sentences are now inadequate. Serious crowding needs elimination and more adequate services need to be provided. These kinds of shortcomings were specifically cited in the report on detention facilities throughout the nation, prepared by the President's Commission on Law Enforcement and the Administration of Justice. The proposed center is intended to provide a new model for the organization and housing of local correctional and detention services.

*Detention Facility*

- Includes housing for pre-sentenced and short-term sentenced offenders. Youth will be separately housed from the adults in both male and female sections. Capacity: Male 320; Female 30.
- Multi-purpose activity space for chapel services, library and group therapy activities.
- Multi-purpose indoor recreation facilities for exercise and movies.
- Outdoor recreation
- Program space for educational, vocational training or correctional therapy activities.

- Infirmary for general examination and treatment, including an 11-bed in-patient nursing and dental clinic. Major diagnostic and surgical work will be contracted for outside the Center, making use of resources already available in the community.
- Food service will be provided in a central dining cafeteria, serving all men except those whose security requirements necessitate eating in, or near, their quarters. Women will be served in separate dining facilities, although all food will be centrally prepared.
- Normal administrative and service functions, including casework services and visiting facilities.

—The Federal Courts are increasingly seeking diagnostic services from the professional staff of the Bureau of Prisons before sentencing offenders. Present resources are usually distant from the community, inadequate and frequently produce lengthy delays. The proposed community location, with a professional staff, will vastly improve this important service. Offenders who do not require confinement can be seen on an out-patient basis, avoiding the further complications of severing work and family ties during a period of study and observation.

*Diagnostic Center*

- Psychiatric, psychological and casework services.
- Testing and interview facilities, including vocational testing.
- In-patient suite for 15, located with the infirmary, serving psychiatric evaluation cases.

—In addition, the facility will include a Community Treatment Center. This program will provide pre-release services to offenders returning from institutions, as well as correctional services for parolees and probationers if Congress provides authority by legislation already introduced (H.R. 809, H.R. 2175 and S. 3261).



*Community Treatment Center*

- Casework services for both residents and "out-patient" cases.
- Respondent living facilities for 40.

—The Center activity will also involve development of alternatives to pretrial detention where feasible, and alternatives to commitment for certain offenders, identification of increased resources available to agencies responsible for probation and parole services, and technical assistance to improve the capacity of state and local correctional agencies. The Center will serve as a regional focal point for the direction of community and correctional resources to effectively intervene in criminal behavior and careers.

## PORTIONS OF STIPULATION OF FACTS

### V

A.

V-1 There are two visiting rooms on Floors 5, 7, 9, and 11 and one visiting room on Floors 2 * and 3. See Stipulation I-1, supra.

V-2 Since April 12, 1976 it has been the MCC policy that no more than 25 persons (both inmates and visitors) are permitted into a visiting room at one time. Petitioners dispute whether this policy is followed.

V-3 The visiting rooms do not contain food vending machines. During the week of February 28, 1977, soft drink machines were installed in the visiting rooms on floors 3, 7, 9 and 11; prior to that time the fifth floor visiting area had a soft drink machine.

V-4 Smoking is not permitted in visiting rooms, although inmates and/or visitors at times do smoke in the visiting rooms.

---

* The visiting room on the Second Floor is not used, inmates housed on this floor receive visitors in a 5th Floor visiting room.

V-5 It is the policy of MCC to subject inmates to a strip search, with visual rectal and vaginal examinations, incident to visits.

V-6 It is the MCC policy that each floor has the following schedule for visiting:

| | |
|---|---|
| 2nd and 5th Floors | 4:30-7:30 p.m.<br>Monday through Friday<br>8:30-11:30 a.m.<br>Saturday and Sunday |
| 9th Floor | 8:30-11:30 a.m.<br>seven days a week |
| 7th and 11th Floors | 12:30-3:30 p.m.<br>seven days a week |
| 3rd Floor | 4:30-7:30<br>Monday, Wednesday and Friday, or by prior special arrangement |

Petitioners dispute whether this policy is followed.

V-7 At the present time, other than during the scheduled visiting hours, including the special attorney visiting hours (4:30 to 6:30 P.M. in the 11th Floor visiting rooms) and certain religious services which are from time-to-time held in the visiting rooms, the visiting rooms are not regularly scheduled for any other activity.

V-8 Attached hereto as Exhibit V-8 and made a part hereof is a copy of MCC guidelines on visiting, effective as of October 15, 1975. Petitioners dispute whether these guidelines are followed.

V-9 Inmates are normally permitted to receive visits from only those persons whose names appear on their visiting lists. Inmates are normally permitted to have six names on their visiting lists at one time. It is the MCC policy that inmates are permitted to change or rotate the names on their visiting lists; petitioners dispute whether this policy is followed.



V-10 Since April 12, 1976, the bathrooms in the visiting rooms have been locked during visiting hours.

V-11 Prior to a visit, each visitor is searched in the lobby by a magnetimeter and some visitors are also patted down.

V-12 All purses, briefcases, and other belongings of visitors are hand-searched in the lobby prior to a visit.

V-13 All visitors have their left hand stamped with a phosphorescent identification mark when they register in the lobby for a visit. Each visitor's hand is then checked for this identification mark when he arrives at the visiting room, before he leaves the visiting room, and before he leaves the lobby. Before an inmate enters the visiting room for a visit, both hands are marked with invisible ink.

B.

V-14 The following number of telephones are located in each residential unit:

| Unit | Pay Telephones | Long Distance Telephones |
|---|---|---|
| Hospital unit | 1 | 1 |
| Honor unit | 1 | 2 |
| 3 | 2 | 2 |
| 5-N | 2 | 2 |
| 5-S | 2 | 2 |
| 7-N | 2 | 2 |
| 7-S | 2 | 2 |
| 9-N | 2 | 2 |
| 9-S | 2 | 2 |
| 11-N | 3 | 2 |
| 11-S | 4 | 4 |

Effective February 14, 1977 each inmate is permitted to draw up to $5.00 in change per week from his commissary account to use for the telephones; prior to that time the limit was $4.00 per week.

C.

V-15 Conjugal visits are not permitted at MCC.

V-16 In addition to the windows described in I-1 *supra*, each residential room at the MCC (except those on 5 South) has a window approximately 4¼″ x 38″ in the door to the room. The doors to the rooms on 5 South do not contain windows.

## XIII

XIII-1 Searches of the persons and rooms of the inmates at MCC are carried out at irregular intervals.

XIII-2 Inmates are not always permitted to observe searches of their rooms. During a formal unit shakedown, when a particular portion of a residential unit is cleared of inmates and a search is conducted, inmates are not permitted to watch searches of their rooms; during the less formal searches which are conducted more often, correctional officers have the discretion to permit the inmate to stand at the doorway of his room to observe the search.

XIII-3 The Bureau of Prisons and MCC definition of contraband is contained in paragraph 702 of the Custodial Manual, Policy Statement 20001.1B which provides as follows:

702. CONTRABAND

1. Contraband may be best defined as any item or article inside an institution that was not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an appropriate staff member. Authorized items may be considered contraband when found in excess quantities, or altered from original status.

2. The following items shall always be considered contraband, within any federal penal or correctional institutions:



a. Guns and firearms of any type.

b. Ammunition, explosives.

c. Knives and tools not provided in accordance with this manual.

d. Hazardous and poisonous chemicals and gases.

e. Narcotics and drugs. These can be dispensed and in the possession of offenders only as authorized by the institution medical department.

f. Intoxicants, such as liquor and alcoholic beverages.

g. Currency, where prohibited.

## XIV

XIV-1 (a) Inmates at MCC are normally not permitted to bring or receive packages, including food packages or personal effects, from outside the institution except that during the Christmas holiday season, each inmate is permitted to receive one package from outside the institution. In addition, on certain Jewish holidays, Jewish inmates are permitted to have special foods brought to the institution.

(b) Inmates are permitted to have any items specifically authorized by the Unit Manager, Case Worker or Chief Correctional Supervisor.

XIV-2 Inmates are not normally permitted to have electric shavers or personal typewriters.

XIV-3 Inmates are prohibited from spending more than $15 per week up to $50 per month at the commissary (except as noted on the commissary list, *see* Exhibit XIV-4). Prior to December 1, 1976, the limit on monthly commissary purchases increases to $45.00.

XIV-4 Inmates are not permitted to visit the commissary which is located in the basement. Rather, once a week inmates are permitted to order items from a commissary list. Attached hereto and made a part hereof as Exhibit XIV-4 are copies of commissary lists dated August 15, 1975, March 1, 1976 and the current commissary list. Petitioners dispute whether all the items on these lists are available for purchase. For certain items (such as watches, radios, etc.) it is the MCC policy to post a picture and literature describing the item in the units. Petitioners dispute whether this policy is followed.



SUPREME COURT OF THE UNITED STATES

No. 77-1829

GRIFFIN BELL, ET AL., PETITIONERS

*v.*

LOUIS WOLFISH, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 2, 1978

The motion of respondent for leave to file *in forma pauperis* is granted. The petition for writ of certiorari is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 277374 190

Supreme Court, U. S.
FILED
DEC 15 1978
MICHAEL RODAK, JR., CLERK

# SUPPLEMENTAL APPENDIX

# In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-1829**

---

GRIFFIN B. BELL, ET AL.,

*Petitioners*

—*v.*—

LOUIS WOLFISH, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**PETITION FOR CERTIORARI FILED JUNE 23, 1978**
**CERTIORARI GRANTED OCTOBER 2, 1978**

# In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-1829**

---

GRIFFIN B. BELL, ET AL.,

*Petitioners*

—*v.*—

LOUIS WOLFISH, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 (MDF)
10-20-76

UNITED STATES OF AMERICA, EX REL.
LOUIS WOLFISH, *et al.*, RELATORS

*—against—*

EDWARD LEVI, ET AL., RESPONDENTS

# RESPONDENTS' RULE 9(g) STATEMENT OF FACTS CONCERNING WHICH THEY CONTEND THERE EXIST NO GENUINE ISSUE

Pursuant to Rule 9(g) of the General Rules of this Court, the respondents submit that there are no genuine issues to be tried as to the following material facts relating to relators' motion for summary judgment dated September 16, 1976 and respondents' cross motion dated October 18, 1976:

1. The following is a description of each of the residential units at the MCC and the furnishings in each as of approximately August 18, 1976:

## SECOND FLOOR

*Honor Unit*

This housing unit is located on the second floor and consists of three clusters of residential rooms: one cluster of five rooms; one cluster of seven rooms; and one cluster of eight rooms. These clusters open onto a multi-purpose area which consists of approximately 674.97 square feet of floor space.

### (i) *Five Room Cluster*

The residential rooms in this cluster which open onto a corridor (8′-6″ x 31′-9¼″, or approximately 298.97 sq.

ft.)* have the following (approximate) square feet of floor space and contain the following number of beds:

| Rm. No. | Sq. Ft. | Beds |
|---|---|---|
| A-201 | 103.3 | 1 |
| A-202 | 114.79 | 2 |
| A-203 | 98.5 | 1 |
| A-204 | 118.45 | 2 |
| A-205 | 115.12 | 2 |

(ii) *Eight Room Cluster*

The residential rooms in this cluster which open onto a corridor (8′-6″ x 31′-9¼″, or approximately 298.97 sq. ft.) have the following (approximate) square feet of floor space and contain the following number of beds:

| Rm. No. | Sq. Ft. | Beds |
|---|---|---|
| B-207 | 117.2 | 2 |
| B-208 | 115.84 | 2 |
| B-209 | 98.5 | 1 |
| B-210 | 114.79 | 2 |
| B-211 | 98.5 | 1 |
| B-212 | 115.17 | 2 |
| B-213 | 115.42 | 2 |
| B-214 | 101.91 | 1 |

(iii) *Seven Room Cluster*

The residential rooms in this cluster which open onto a corridor (8′-6″ x 31′-9¼″, or approximately 298.97 sq. ft.) have the following (approximate) square feet of floor space and contain the following number of beds:

* The room and area dimensions and square footage computations relating to the MCC contained hereinafter are based upon the information contained in the architectural plans of the MCC, relevant portions of which are submitted herewith and made a part hereof as Exhibit 1. So as to protect against unwarranted and unnecessary disclosure of the information contained therein (see transcript of the hearing before this Court on August 16, 1976) we request that the Court place these plans under seal.



| Rm. No. | Sq. Ft. | Beds |
|---|---|---|
| C-215 | 114.62 | 2 |
| C-216 | 115.84 | 2 |
| C-217 | 98.5 | 1 |
| C-218 | 114.79 | 2 |
| C-219 | 98.5 | 1 |
| C-220 | 115.17 | 2 |
| C-221 | 122.9 | 2 |

Each room contains two windows (51″ x 22″ each), a washbasin and toilet, chair, mirror and light fixture, towel rack and shelf, light and wall bracket.*

There are two shower rooms (7′-3″ x 4′-9″; 9′-9½″ x 5′0″) each containing two shower-heads with a dressing room (5′-6″ x 7′-3″; 5′-3″ x 7′-1″) for use by the inmates housed in this unit. In addition, there is common bathroom (containing washbasin and toilet) available for use by inmates.

A special room (16′-9″ x 9′-7″) with a private shower as well as toilet and washbasin is located in this area and is equipped for and used as an Emergency or Intensive Care Unit. Room A-201 also contains a private shower and is used, as needed, by the Hospital Unit as an isolation room.

(iv) *Other Rooms*

Staff Office (11′-1″ x 12′ x 1″)
Linen & Utility Rm. (9′-3″ x 11′-11″)
Janitorial Rm. containing a clothes washer and drier
Pantry (9′-4½″ x 9′-3″, or 86.3 sq. ft.) containing:

- 1 coffee urn (4 unit)
- 1 toaster
- 1 microwave oven and table
- 1 wall unit containing a 2-burner stove, 2 door refrigerator, ice-maker and sink
- 1 drink dispenser (double unit)

* Desks (w/3 drawers), small tables and cabinets and additional chairs have been distributed throughout this unit for use by inmates in their rooms.

Visiting Rm.* containing:

1 bathroom
1 water fountain
Search Rm.

Multipurpose Area (28′-9″ x 22′-9″, or approximately 674.97 sq. ft.) containing:

20 chairs
2 couches
1 pay telephone
2 long-distance telephones **
1 25″ color T.V.

12 tables
1 U-shaped work table
1 two-unit mail box (personal & attorney mail)
1 jogging machine
1 exercycle

## THIRD FLOOR

There is one residential unit on the Third Floor consisting of a total of 24 rooms arranged in three clusters of 8 rooms each; these clusters open onto a single story multipurpose room, see below). Except for individual residential rooms. bathroom and shower facilities and the pantry, all areas in this unit have wall to wall carpeting.

(i) Residential Rm:

Residential rooms in each cluster open onto a corridor *** (34′-6″ x 10′-10″, or approximately 339.95 sq. ft.) and have the following (approximate) dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 12 | 11′-6″ x 7′-6″ | 75.9 |
| 8 | 11′-6″ x 7′-8″ | 76.99 |
| 4 | 11′-6″ x 7′-9″ | 77.66 |

* This room is not used; inmates housed on this floor receive visitors in the 5th Floor visiting room.

** Installed as of October 7, 1976; see preliminary injunction issued in this action on September 30, 1976.

*** Each corridor has two windows, each window measuring approximately 17″ x 52″.



Window (20 of 24 rooms) (22″ x 51½″)
Bunkbed
Desk (w/3 drawers)
Chair
Washbasin and toilet
Towel rack and shelf
Mirror and light fixture
Lamp and wall bracket

In addition, there are three showers in this unit, one in each cluster. Twenty of the 24 residential rooms either presently have a book shelf or will have a book shelf after security modifications are completed.

(ii) Multipurpose room (42′ x 38′-4″, or approximately 1497.9 sq. ft.) and a separate recreation room with corridor (approximately 352.64 sq. ft.) containing:

Windows (Multipurpose Rm):

2 windows, each window measuring 9′-0 x 6′-3″ divided into 4 vertical sections and 2 horizontal sections

Window (Rec. Rm):

1 window 13′-6″ x 3′-4″ divided into 3 vertical sections
1 pool table
3 couches
3 lounge chairs
23 chairs
5 tables (eating)
4 coffee tables
2 pay telephones
2 long distance telephones *
2 T.V.'s (one color)
1 ping pong table
1 jogging machine
1 iron and ironing board
1 clothes washer and drier
1 janitorial closet
1 linen closet

* Installed as of October 7, 1976.

1 two-unit mail box (personal & attorney mail)
1 water fountain
1 exercycle
1 medicine ball
1 typewriter

(iii) Visiting room (approximately 318.57 sq. ft.), with a separate search room, containing:

1 window 15′-3″ x 3′-4″
1 table
3 coffee tables
5 chairs
1 couch
1 water fountain

(iv) Food Pantry (approximately 365.71 sq. ft) containing:

1 serving table
1 microwave oven and table
1 drink dispenser (double unit)
1 automatic coffee machine
1 refrigerator/freezer
1 ice machine
1 condiment table (w/6 unit holder)
1 counter (w/sink and storage area)
trash barrels

## FIFTH AND SIXTH FLOORS

There are two housing units on these floors designated as 5 North and 5 South.

*5 South*

5 South consists of 6 clusters of 8 rooms each (on two floor levels) for a total of 48 rooms. These room clusters open onto a two-story multipurpose room (see below). Except for individual residential rooms, bathroom and showers facilities and the pantry, all areas of this unit have wall-to-wall carpeting.

(i) Residential Rm:

Residential rooms in each cluster open onto a corridor. The three corridors on the lower lower level each measure approximately 29′-6″ x 10-0″, or295 sq. ft.; the three



corridors on the upper level, including the landing, measure approximately 33′-2″ x 10′-0″, or 319.77 sq. ft. The residential rooms have the following dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 24 | 7′-6″ x 11′-6″ | 75.9 |
| 16 | 7′-8″ x 11′-6″ | 76.99 |
| 8 | 7′-9″ x 11′-6″ | 77.66 |

Window (22″ x 51½″)
Bed (w/2 drawers)
Desk (w/3 drawers) and chair
Lamp and wall bracket
Book shelf
Towel rack and shelf
Mirror and light fixture
Washbasin

In addition, two toilets, one shower, and two additional washbasins are located in each 8 room cluster, for a total of 12 toilets, 6 showers and 12 washbasins.

(ii) Multipurpose room with alcoves (42′ x 38′-4″, or approximately 1649.52 sq. ft) and a separate recreation room (approximately 278.99 sq. ft.) containing:

Windows (Multipurpose Rm):

2 windows, each measuring 12′-6″ x 9′-2″ divided into 4 vertical sections and 2 horizontal sections
1 window measuring 12′-6′ x 7′-2½″ divided into 3 vertical sections and 2 horizontal sections

Windows (Recreation Rm):

1 window measuring 22′-6″ x 3′-4″ divided into 5 vertical sections

19 tables (eating)
7 coffee tables
3 lounge chairs
66 chairs
4 couches
2 pay telephones

2 long distance telephones *
1 two-unit mailbox (personal and attorney mail)
1 bookcase
1 water fountain
1 pool table
1 ping pong table
1 exercycle
1 exercise chair
1 color T.V.
1 black and white T.V.
1 iron and ironing board
1 sewing machine
1 jogging machine
1 set of wall-exercise pulleys
1 medicine ball
1 typewriter
1 clothes washer and drier
linen closet
janitorial closet (with cleaning equipment)

(iii) Education area with corridor (approximately 919.84 sq. ft.) containing:

black board
tack board
table
15 school desks

(iv) Pantry with corridor (approximately 520.78 sq. ft.) containing:

1 microwave oven and table
1 toaster
1 coffee maker
1 refrigerator/freezer
1 ice machine
1 sink and cabinet unit

(v) Visiting Rm (21′-8″ x 19′-½″, or approximately 415.35 sq. ft.) with adjacent inmate search room, containing:

* Installed as of October 7, 1976.



1 window 19′ x 3′-4″ divided into 5 vertical sections
1 bathroom
26 chairs
tables
couches
1 water fountain

*5 North*

5 North consists of 6 clusters of 8 rooms each (on two floor levels) for a total of 48 rooms. These room clusters open onto a two-story multipurpose room (see below). Except for individual rooms, bathroom and shower facilities and the pantry, all areas of this unit have wall-to-wall carpeting.

(i) Residential Rooms:

Residential rooms in each cluster open onto a corridor.* The three corridors on the lower level each measure approximately 34′-6″ x 10′-0″, or 339.35 sq. ft.; the three corridors on the upper level, including stairway landings, measure approximately 38′-2″ x 10′-0″, or 364.12 sq. ft. The residential rooms have the following dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 24 | 7′-6″ x 11′-6″ | 75.9 |
| 16 | 7′-8″ x 11′-6″ | 76.99 |
| 8 | 7′-9″ x 11′-6″ | 77.66 |

Window (22″ x 51½″)
Bed (w/2 drawers)
Desk (w/3 drawers) and chair
Lamp and wall bracket
Book shelf
Towel rack and shelf
Mirror and light fixture
Washbasin and toilet

In addition, there is one shower located in each 8 room cluster, for a total of 6 showers.

* Each corridor has two windows, each window measuring approximately 17″ x 52″.

(ii) Multipurpose room with alcoves (42′ x 38′-4″, or approximately 1649.52 sq. ft.) and a separate recreation room (approximately 278.99 sq. ft.) containing:

Windows (Multipurpose Rm):

2 windows, each measuring 12′-6″ x 9′-2″ divided into 4 vertical sections and 2 horizontal sections
1 window measuring 12′-6″ x 7′-2½″ divided into 3 vertical sections and 2 horizontal sections

Windows (Rec. Rm.):

1 window measuring 22′-6″ x 3′-4″ divided into 5 vertical sections

13 tables (eating)
30 chairs
4 coffee tables
3 couches
3 lounge chairs
1 two-unit mailbox (personal & attorney mail)
2 pay telephones
2 long distance telephones *
2 color T.V.'s
1 bookcase
1 water fountain
1 typewriter
1 medicine ball
1 jogging machine
1 exercycle
1 ping pong table
1 clothes washer and drier
linen closet
janitorial closet (w/cleaning equipment)

(iii) Education area with corridor (approximately 919.84 sq. ft.) containing:

blackboard
tack board
1 pool table

* Installed as of October 7, 1976.



(iv) Pantry with corridor (approximately 520.78 sq. ft.) containing:

1 serving table
1 microwave oven and table
1 drink dispenser (double unit)
1 coffee urn (4 unit)
1 toaster
1 refrigerator/freezer
1 ice machine
1 condiment table (w/6 unit holder)
1 counter (w/sink and storage area)
trash barrels
1 sink

(v) Visiting Rm (21′-8″ x 19′-½″, or approximately 415.35 sq. ft.) with adjacent inmate search room, containing:

1 window measuring 19′ x 3′-4″ divided into 5 vertical sections
1 bathroom
26 chairs
tables
couches
1 water fountain

*Administrative and Staff Offices*

Adjacent to the education areas on 5 North and 5 South are a total of eight offices used by the Unit Management Team, and for counseling; in addition 2 bathrooms (washbasin and toilet) are located in this area, one in 5 North and one in 5 South.

## SEVENTH AND EIGHTH FLOORS

There are two housing units on these floors designated as 7 North and 7 South.

*7 North*

7 North consists of 6 clusters of 8 rooms each (on two floor levels) for a total of 48 rooms. These room clusters open onto a two-story multipurpose room (see below). Except for individual residential rooms, bathroom and

shower facilities, and the pantry, all areas of this unit have wall to wall carpeting.

(i) Residential Rooms

Residential rooms in each cluster open onto a corridor.* The three corridors on the lower level each measure approximately 34′-6 x 10′-0″, or 339.35 sq. ft.; the three corridors on the upper level, including stairway landings, measure approximately 38′-2″ x 10′-0″, or 364.12 sq. ft. The residential rooms have the following dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 24 | 7′-6″ x 11′-6″ | 75.9 |
| 16 | 7′-8″ x 11′-6″ | 76.99 |
| 8 | 7′-9″ x 11′-6″ | 77.66 |

37 rooms have single beds (w/2 drawers)
11 rooms have bunk beds (w/2 drawers)
Window (22″ x 51½″)
Desk (w/3 drawers) and chair **
Lamp and wall bracket
Book shelf
Towel rack and shelf
Mirror and light fixture
Washbasin and toilet

In addition, there is one shower located in each 8 room cluster, for a total of 6 showers.

(ii) Multipurpose room with alcoves (42′ x 38′-4″, or approximately 1649.52 sq. ft.) and a separate recreation room (approximately 278.99 sq. ft.) containing:

Windows (Multipurpose Rm):

2 windows, each measuring 12′-6″ x 9′-2″ divided into 4 vertical sections and 2 horizontal sections
1 window measuring 12′-6″ x 7′-2½″ divided into 3 vertical sections and 2 horizontal sections

* Each corridor has two windows, each window measuring approximately 17″ x 52″.

** Two chairs are included in most rooms with bunk beds.



Windows (Recreation Rm):

1 window measuring 22′-6″ x 3′-4″ divided into 5 vertical sections
57 chairs
14 tables (eating)
1 two-unit mailbox (personal & attorney mail)
3 coffee tables
3 lounge chairs
3 couches
2 pay telephones
2 long distance telephones *
2 color T.V.'s
1 pool table
1 water fountain
1 typewriter
1 jogging machine
1 medicine ball
1 exercycle
1 ping pong table
1 clothes washer and drier
linen closet
janitorial closet (w/cleaning equipment)

(iii) Education area with corridor (approximately 919.84 sq. ft.) containing:

black board
tack board
table
14 school desks

(iv) Pantry with corridor (approximately 520.78 sq. ft) containing:

1 serving table
1 microwave oven and table
1 toaster
1 coffee urn (4 unit)
1 sink
1 drink dispenser (double unit)

* Installed as of October 7, 1976.

1 refrigerator/freezer
1 ice machine
1 condiment table (w/6 unit holder)
1 counter (w/sink and storage area)
trash barrels

(v) Visiting Rm (21′-8″ x 19′-½″, or approximately 415.35 sq. ft.) with adjacent inmate search room, containing:

1 window measuring 19′ x 3′-4″ divided into 5 vertical sections
1 bathroom
2 couches
9 lounge chairs
8 chairs
2 tables
3 coffee tables
1 water fountain

*7 South*

7 South consists of 6 clusters of 8 rooms each (on two floor levels) for a total of 48 rooms. These room clusters open onto a two-story multipurpose room (see below). Except for individual rooms, bathroom and shower facilities and the pantry, all areas of each unit have wall-to-wall carpeting.

(i) Residential Room:

Residential rooms in each cluster open onto a corridor.* The three corridors on the lower level each measure approximately 34′-6″ x 10′-0″, or 339.35 sq. ft.; the three corridors on the upper level, including stairway landings, measure approximately 38′-2″ x 10′-0″, or 364.12 sq. ft. The residential rooms have the following dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 24 | 7′-6″ x 11′-6″ | 75.9 |
| 16 | 7′-8″ x 11′-6″ | 76.99 |
| 8 | 7′-9″ x 11′-6″ | 77.66 |

* Each corridor has two windows, each window measuring approximately 17″ x 52″.



Window (22″ x 51½″)
Bed (w/2 drawers)
Desks (w/3 drawers) and chair
Lamp and wall bracket
Towel rack and shelf
Mirror and light fixture
Washbasin and toilet

In addition, there is one shower located in each 8 room cluster, for a total of 6 showers.

(ii) Multipurpose room with alcoves (42′ x 38′-4″, or approximately 1649.52 sq. ft.) and a separate recreation room (approximately 278.99 sq. ft.) containing:

Windows (Multipurpose Rm):

2 windows, each measuring 12′-6″ x 9′-2″ divided into 4 vertical sections and 2 horizontal sections
1 window measuring 12′-6″ x 7″-2½″ divided into 3 vertical sections and 2 horizontal sections

Windows (Recreation Rm):

1 window measuring 22′-6″ x 3′-4″ divided into 5 vertical sections

43 chairs
9 tables (eating)
1 coffee table
3 lounge chairs
3 couches
6 swivel chairs
2 pay telephones
2 long distance telephones *
2 color T.V.'s
1 water fountain
1 pool table
1 ping pong table
1 medicine ball
1 typewriter

* Installed as of October 7, 1976.

1 jogging machine
1 exercycle
1 clothes washer and drier
linen closet
janitorial closet (w/cleaning equipment)
1 two-unit mailbox (personal & attorney mail)

(iii) Education area with corridor (approximately 919.84 sq. ft.) containing:

blackboard
tack board
table
16 school desks

(iv) Pantry with corridor (approximately 528.78 sq. ft.) containing:

1 serving table
1 microwave oven and table
1 coffee urn (double unit)
1 drink dispenser (double unit)
1 refrigerator/freezer
1 ice machine
1 sink
1 condiment table (w/6 unit holders)
1 counter (w/sink and storage area)
trash barrels

(v) Visiting Room (21′-8″ x 19′-½″, or approximately 415.35 sq. ft) with an adjacent inmate search room, containing:

1 window measuring 19′ x 3′-4″ divided into 5 vertical sections
1 bathroom
2 couches
8 swivel chairs
14 chairs
3 tables
2 coffee tables
1 water fountain



*Administrative and Staff Offices*

Adjacent to the education areas on 7 North and 7 South are a total of eight offices used by the Unit Management Team, and for counseling; in addition, 2 bathrooms (washbasin and toilet) are located in this area, one in 7 North and one in 7 South.

## NINTH AND TENTH FLOORS

There are two housing units on these floors designated as 9 North and 9 South.

*9 North*

9 North consists of 6 clusters of 8 rooms each (on two floor levels) for a total of 48 rooms. These room clusters open onto a two-story multipurpose room (see below). Except for individual residential rooms, bathroom and shower facilities and the pantry, all areas of this unit have wall-to-wall carpeting.

(i) Residential Rooms

Residential rooms in each cluster open onto a corridor.* The three corridors on the lower level each measure approximately 34′-6″ x 1[illegible]′-0″, or 339.35 sq. ft.; the three corridors on the upper level including stairway landings, measure approximately 38′-2″ x 10′-0″ or 364.12 sq. ft. The residential rooms have the following dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 24 | 7′-6″ x 11′-6″ | 75.9 |
| 16 | 7′-8″ x 11′-6″ | 76.97 |
| 8 | 7′-9″ x 11′-6″ | 77.66 |

23 rooms have bunk beds (w/2 drawers)
25 rooms have single beds (w/2 drawers)
Desk (w/3 drawers) and chair **

* Each corridor has two windows, each window measuring approximately 17″ x 52″.

** Two chairs are included in most rooms with bunk beds.

Lamp and wall bracket
Book shelf
Towel rack and shelf
Mirror and light fixture
Washbasin and toilet

In addition, there is one shower located in each 8 room cluster, for a total of 6 showers.

(ii) Multipurpose room with alcove (42′ x 38′-4″, or approximately 1649.52 sq. ft.) and a separate recreation room (approximately 278.99 sq. ft.) containing:

Windows (Multipurpose Rm):

2 windows, each measuring 12′-6 x 9′-2″ divided into 4 vertical sections and 2 horizontal sections
1 window measuring 12′-6″ x 7′-2½″ divided into 3 vertical sections and 2 horizontal sections

Windows (Recreation Rm):

1 window measuring 22′-6″ x 3′-4″ divided into 5 vertical sections

8 tables (eating)
32 chairs
6 coffee tables
4 couches
3 lounge chairs
2 pay telephones
2 long distance telephones *
2 color T.V.'s
1 black and white T.V.
1 jogging machine
1 typewriter
1 medicine ball
1 exercycle
1 water fountain
1 two-unit mailbox (personal and attorney mail)
1 pool table

* Installed as of October 7, 1976.



1 ping pong table
1 clothes washer and drier
linen closet
janitorial closet (w/cleaning equipment)

(iii) Education area with corridor (approximately 919.84 sq. ft.) containing:

blackboard
tack board
table
16 school desks

(iv) Pantry with corridor (approximately 529.78 sq. ft.) containing:

1 serving table
1 microwave oven and table
1 drink dispenser (double unit)
1 coffee urn (4 unit)
1 toaster
1 refrigerator/freezer
1 sink
1 ice machine
1 condiment table (w/6 unit holders)
1 counter (w/sink and storage area)
trash barrels

(v) Visiting Room (21′-8″ x 19′-½″, or approximately 415.35 sq. ft.) with adjacent inmate search room, containing:

1 window measuring 19′ x 3′-4″ divided into 5 vertical sections

11 chairs
2 tables
2 coffee tables
1 couch
9 swivel chairs
1 bathroom
1 water fountain

*9 South*

9 South consists of 6 clusters of 8 rooms each (on two floor levels) for a total of 48 rooms. These room clusters open onto a two-story multipurpose room (see below). Except for individual rooms, bathroom and shower facilities and the pantry, all areas of this unit have wall-to-wall carpeting.

(i) Residential Rooms:

Residential rooms in each cluster open onto a corridor.* The three corridors on the lower level each measuring approximately 34′-6″ x 10′-9″, or 339.35 sq. ft.; the three corridors on the upper level, including stairway landings, measure approximately 38′-2″ x 10′-0″, or 364.12 sq. ft. The residential rooms have the following dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 24 | 7′-6″ x 11′-6″ | 75.9 |
| 16 | 7′-8″ x 11′-6″ | 76.99 |
| 8 | 7′-9″ x 11′-6″ | 77.66 |

Window (22″ x 51½″)
Bed (w/2 drawers)**
Desk (w/3 drawers) and chair
Towel rack and shelf
Mirror and light fixture
Washbasin and toilet

In addition, there is one shower located in each 8 room cluster, for a total of 6 showers. Heavy duty security screens have been placed over the windows in 24 of the residential rooms.

---

* Each corridor has two windows, each window measuring approximately 17″ x 52″.

** Except the 8 rooms used for disciplinary segregation which contain a metal-brass bed bolted to the floor; when necessary, for safety reasons or to prevent distruction of property, on occasions, the desk and shelf have been removed. In addition, the carpeting in the corridor for this 8-room cluster has been removed and replaced with vinyl tile.



(ii) Multipurpose room with alcoves (42′ x 36′-4″, or approximately 1649.52 sq. ft.) and a separate recreation room (approximately 278.99 sq. ft.):

Windows (Multipurpose Rm):

2 windows, each measuring 12′-6″ x 9′-2″ divided into 4 vertical sections and 2 horizontal sections
1 window measuring 12′-6″ x 7′-2½″ divided into 3 vertical sections and 2 horizontal sections

Windows (Recreation Rm):

1 window measuring 22′-6″ x 3′-4″ divided into 5 vertical sections

7 tables (eating)
32 chairs
6 coffee tables
4 couches
2 lounge chairs
2 pay telephones
2 long distance telephones *
2 color T.V.'s
1 bookcase
1 water fountain
1 pool table
1 ping pong table
1 jogging machine
1 typewriter
1 medicine ball
1 exercycle
1 clothes washer and drier
linen closet
janitorial (w/cleaning equipment)
2 mailboxes

(iii) Education area with corridor (approximately 919.84 sq. ft.) containing:

tack board
table
16 school desks

---

* Installed as of October 7, 1976.

(iv) Pantry with corridor (approximately 520.78 sq. ft.) containing:

1 serving table
1 microwave oven and table
1 drink dispenser (double unit)
1 coffee urn (4 unit)
1 toaster
1 sink
1 refrigerator/freezer
1 ice machine
1 condiment table (w/6 unit holders)
1 counter (w/sink and storage areas)
trash barrels

(v) Visiting Room (21′-8″ x 19′-½″, or approximately 415.35 sq. ft.) with an adjacent inmate search room containing:

1 window measuring 19′ x 3′-4″ divided into 5 vertical sections
1 bathroom
1 water fountain
12 chairs
2 tables
3 coffee tables
1 couch
5 swivel chairs

*Administrative and Staff Offices*

Adjacent to the education areas on 9 North and 9 South are eight offices used by the Unit Management Team and for counseling; in addition, two bathrooms (washbasin and toilet) are located in this area, one in 9 North, and one in 9 South.



## ELEVENTH AND TWELFTH FLOORS

*11 North* *

11 North consists of 6 clusters of 8 rooms each (on two floor levels) for a total of 48 rooms. These room clusters open onto a two-story multipurpose room (see below). Except for individual rooms, bathroom and shower facilities and the pantry, all areas of the unit have wall-to-wall carpeting.

(i) Residential Rooms

Residential rooms in each cluster open onto a corridor.** The three corridors on the lower level each measure approximately 34′-6″ x 10′-0″, or 339.35 sq. ft.; the three corridors on the upper level, including stairway landings, measure approximately 38′-2″ x 10′-0″, or 364.12 sq. ft. The residential rooms have the following dimensions and contain the following furnishings:

| No. of Rms. | Dimensions | Sq. Ft. |
|---|---|---|
| 24 | 7′-6″ x 11′-6″ | 75.9 |
| 16 | 7′-8″ x 11′-6″ | 76.99 |
| 8 | 7′-9″ x 11′-6″ | 77.66 |

Window (22″ x 51½″)
Bed (w/2 drawers)
Desk (w/3 drawers) and chair
Lamp and wall bracket
Towel rack and shelf
Book shelf
Mirror and light fixture
Washbasin and toilet

In addition, there is one shower located in each 8 room cluster, for a total of 6 showers.

---

* There are two units on these floors. One unit, 11-South, is a dormitory and not involved in this motion; the present capacity of that unit is 120 beds.

** Each corridor has two windows, each measuring approximately 17″ x 52″.

(ii) Multipurpose room with alcoves (42′ x 38′-4″, or approximately 1649.52 sq. ft.) and a separate recreation room (approximately 278.99 sq. ft.) containing:

Windows (Multipurpose Rm):

2 windows, each measuring 12′-6″ x 9′-2″ divided into 4 vertical sections and 2 horizontal sections
1 window measuring 12′-6″ x 7′-2½″ divided into 3 vertical sections and 2 horizontal sections

Windows (Recreation Rm):

1 window measuring 22′-6″ x 3′-4″ divided into 5 vertical sections

10 tables (eating)
30 chairs
3 small round tables
5 couches
3 lounge chairs
2 color T.V.'s
3 pay telephones
2 long distance telephones *
1 two-unit mailbox (personal and attorney mail)
1 bookcase
1 pool table
1 ping pong table
1 water fountain
2 typewriters
1 jogging machine
1 exercycle
1 medicine ball
1 clothes washer and drier
1 linen closet
janitorial closet (w/cleaning equipment)

(iii) Education area with corridor (approximately

* Installed as of October 7, 1976.



919.84 sq. ft.) containing:

blackboard
tack board
table
school desks

(iv) Pantry with corridor (approximately 520.78 sq. ft.) containing:

1 microwave oven and table
1 drink dispenser (double unit)
1 coffee urn (4 unit)
1 refrigerator/freezer
1 ice machine
1 condiment table (w/6 unit holder)
1 counter (w/sink and storage area)
trash barrels

(v) Visiting Room (21′-8″ x 19′-½″, or approximately 415.35 sq. ft.) with adjacent inmate search room, containing:

1 window 19′ x 3′-4″ divided into 5 vertical sections
1 bathroom
1 water fountain
12 chairs
2 tables
couches

*Administrative and Staff Offices*

Adjacent to the education areas on 11 North and 11 South are six offices used by the Unit Management Team, and for counseling; one office is set aside for use by inmates on 11 South and 11 North for legal work. In addition, there are two bathrooms (washbasin and toilet) located in this area, one in 11 North and one in 11 South.

2. The MCC Daily Population Log Summary for each day since August 2, 1975 (the day the MCC opened), setting forth the population count at the MCC, is annexed to the Taylor Affidavit.

3. At certain times since the MCC opened, some inmates have been required, for short periods of time, to sleep on cots or beds placed in corridors or commons areas in various of the residential units. Prior to February 1976, and for not more than one night, a few male inmates slept on mattresses placed in corridors or commons areas in a residential unit; further on the evening of October 13, 1976, 6 individuals slept on mattresses placed in corridors or commons areas in a residential unit on that evening.

4. On the occasions when it has been necessary to house inmates on cots or beds placed in corridors or commons areas, it has been the MCC policy to assign inmates there based upon an inmate's expected duration of commitment at MCC (inmates with the shortest expected duration) and an evaluation of the health, security or safety risks posed by an inmates' assignment to such accommodations; as soon as rooms have become vacant, inmates housed in commons areas or corridors have been reassigned to such rooms based upon length of time in such area (longest first).

5. Since March 3, 1976, the MCC policy regarding assignment of inmates to residential units has been as follows:

| Unit | Designation |
|---|---|
| Hospital (9-bed unit) | As needed |
| Honor Unit | Cadre and pre-release |
| 3 | Protective custody |
| 5 South | Women |
| 5 North | Cadre and undesignated volunteer workers |
| 7 South | Pre-trial detainees |
| 7 North | Pre-trial detainees |
| 9 South | Maximum security; administrative detention; disciplinary segregation |
| 9 North | Pre-trial detainees |
| 11 South | Writ and other sentenced |
| 11 North | Sentenced, parole violator and writ |



6. The "cadre" consists of individuals who after conviction and sentencing, have been designated to serve their sentences at the MCC, and parole or probation violators. Members of the cadre are assigned to work at various administrative and other jobs at the MCC.

7. (a) Individuals assigned to Units 5 North (cadre and undesignated volunteer workers), 5 South (women) and the Honor Unit (cadre and pre-release) are locked in their residential rooms only when such individuals are placed under administrative detention. At all other times, individuals in these units have unrestricted access to all areas (except administrative offices) of the residential units to which they have been assigned.

(b) Individuals assigned to Units 3, 7 North, 7 South, 9 North, 9 South and 11 North are locked in their residential rooms only at the following times:

(i) 11:00 P.M. to 6:30 A.M.;
(ii) Head counts (4:00 P.M. and 7:30 P.M.)
(iii) When placed under administrative detention or disciplinary segregation.

At all other times, individuals in these units have unrestricted access to all areas (except administrative offices) of the residential units to which they have been assigned.

8. It is the MCC policy to assign and designate an inmate for confinement at a particular correctional institution within 1 or 2 days of the date on which the MCC receives the inmate's Judgment and Commitment from the sentencing court.

9. After assignment and designation of an inmate as described in paragraph 8 *supra*, it is the MCC policy to transport the inmate (if not assigned to and designated for the MCC) to the designated institution at the earliest possible time.

10. As of May 11, 1976 the Bureau of Prisons assigned to the MCC and commenced operating, a 22-seat bus; this bus is used by the MCC to transport individuals between the MCC and other federal correctional facilities.

11. The MCC general library contains approximately three thousand hardbacks books consisting of general ref-

erence, fiction and nonfiction titles; in addition, the library contains approximately 5,000 paperback books (fiction and nonfiction). Approximately once every three weeks, the MCC receives 2,000 to 3,000 paperback books for distribution to inmates.

12. Books from the MCC general library are placed on carts or racks in the residential units for use by the inmates there. The selection of books on these carts are changed approximately once every three weeks.

13. Inmates may request a particular book or a book on a particular subject from the general library.

14. The definition of contraband is contained in paragraph 702 of the Custodial Manual, Policy Statement 20001.B which provides as follows:

702. CONTRABAND

1. Contraband may be best defined as any item or article inside an institution that was not issued by the institution, purchased through approved channels or approved for issue by an appropriate staff member. Authorized items may be considered contraband when found in excess quantities, or altered from original status.
2. The following items shall always be considered contraband, within any federal penal or correctional institutions:

   a. Guns and firearms of any type.
   b. Ammunition, explosives.
   c. Knives and tools not provided in accordance with this manual.
   d. Hazardous and poisonous chemicals and gases.
   e. Narcotics and drugs. These can be dispensed and in the possession of offenders only as authorized by the institution medical department.
   f. Intoxicants, such as liquor and alcoholic beverages.
   g. Currency, where prohibited.

15. Inmates at MCC are not permitted to have electric shavers or personal typewriters and are normally not



permitted to receive packages, including food packages or personal effects, from outside the institution except on Christmas and certain Jewish holidays.

16. The items for sale in the MCC commissary are set forth in the commissary list annexed to the affidavit of Warden Larry Taylor.

17. In addition to the books listed in Exhibit C to the affidavit of Michael A. Young, the MCC law library contains Wright's Federal Practice and Procedure, those portions of the Bureau of Prisons Policy Statements pertaining to inmates, a copy of recent revisions of the parole regulations as set forth in the Federal Register, and the current advance sheets for the Supreme Court Reporter.

18. Current advance sheets, and when available, new hardbound volumes of the Supreme Court, Federal Second, Federal Supplement, and Criminal Law Reporters, as well as pocket supplements to Modern Federal Digest, Federal Digest, and United States Code annotated are received regularly by the MCC law library as part of its subscriptions to these reporting, digest, and annotation services. This constant updating of these materials has occurred since the opening of MCC and is done pursuant to the provisions of the Bureau of Prisons Policy Statement 2001.20.

19. Since April 1976, the following newspapers have been available for purchase by inmates in all residential units from a vendor who visits each residential unit once a day:

New York *Times*
New York *Daily News*
*El Diario*
*Amsterdam News*

20. Inmates have access to at least one television (see paragraph 1 *supra*) from 6:30 A.M. to 11:00 P.M. except when locked into their residential rooms as described in paragraph 7 *supra*.

21. Portable radios are available for purchase from the MCC commissary by inmates.

22. Every other week, the MCC distributes, free of charge, a variety of recent news periodicals and other magazines to the residential units.

23. During a formal shakedown of an entire unit, room searches at MCC are performed out of the presence of the inmates whose rooms are being searched; during less formal searches of random rooms, the correctional officers have discretion to permit the inmates involved to stand at the doorway to their rooms to observe the search.

24. No receipts are given for contraband seized and confiscated as the result of room searches. However, where the contraband is of a serious enough nature to warrant disciplinary action (*i.e.* other than nuisance contraband), an incident report is filled out by a correctional officer, and a copy is given to the inmate.

25. On October 14, 1976 the MCC mail room received 508 letters to inmates of which 382 were personal letters.

Dated: New York, New York
October 18, 1976

ROBERT B. FISKE, JR.
United States Attorney
Attorney for the Respondents

By: _____

FREDERICK P. SCHAFFER
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 279045 224

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 77-1829

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

GRIFFIN B. BELL, ET AL.,

Petitioners,

-v.-

LOUIS WOLFISH, ET AL.,

Respondents.

---

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Respondents, through their counsel, respectfully request leave to proceed here in forma pauperis and permission to file in typewritten form and without payment of fees and costs their brief in opposition to the Government's petition for a writ of certiorari. Counsel certifies that, throughout the proceedings below, respondents were represented by counsel appointed pursuant to the Criminal Justice Act.

Phyllis Skloot Bamberger

PHYLLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971
Attorneys for Respondents.

New York, New York
August 23, 1978

10

No. 77-1829

RECEIVED
AUG 23 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

GRIFFIN B. BELL, ET AL.,

Petitioners,

-v.-

LOUIS WOLFISH, ET AL.,

Respondents.

---

CERTIFICATE OF SERVICE

---

I hereby certify that three copies of the within brief in opposition to a petition for writ of certiorari, and one copy of respondents' application to proceed in forma pauperis, have been mailed by first class mail to the Solicitor General of the United States, and that two copies of the brief and one of the application for forma pauperis relief have been mailed to the United States Attorney for the Southern District of New York.

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorneys for Respondents.

New York, New York
August 23, 1978

10

No. 77-1829

RECEIVED
AUG 23 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

GRIFFIN B. BELL, ET AL.,

Petitioners,

-v.-

LOUIS WOLFISH, ET AL.,

Respondents.

---

BRIEF IN OPPOSITION TO A
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorneys for Respondents.

MICHAEL B. MUSHLIN,
JOHN BOSTON,
Of Counsel.

10

INDEX


| | Page |
|---|---|
| Table of Cases and Other Authorities Cited | i |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 1-2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | |
| A. Prior Proceedings | 2 |
| B. Double-Celling | 3 |
| C. The Publisher-Only Rule | 7 |
| D. Visual Anal and Genital Searches | 7 |
| E. Pretrial Detainees' Observance of Random, Frequent, and Unannounced Searches of their Cells | 10 |
| F. Receipt of Packages | 11 |
| Reasons for Denying the Writ | |
| A. The five conditions of confinement raised in the petition are unconstitutional under any of the tests, and therefore this case is an inappropriate vehicle for the resolution of the issues presented | 12 |
| B. Double-Celling | 15 |
| C. The Publisher-Only Rule | 17 |
| D. Reasonableness of Searches and Seizures | |
| 1. Visual Anal and Genital Searches | 20 |
| 2. Inmates' Presence at Searches of their Cells | 22 |
| E. Receipt of Packages | 23 |
| Conclusion | 25 |


TABLE OF CASES


Bell v. Manson, 427 F.Supp. 450 (D.Conn. 1976) ..... 21

Benjamin v. Malcolm, 75 Civ. 3073 (S.D.N.Y. Aug. 14, 1975) . 18

Bijeol v. Benson, 404 F.Supp. 595 (S.D.Ind. 1975) ..... 21

Campbell v. McGruder, Docket No. 75-1350 (D.C. Cir. March 30, 1978) ..... 13





Collins v. Schoonfield, 344 F.Supp. 257 (D.Md. 1972) ..... 18

Cooper v. Morin, Index No. 74 1411 (Sup.Ct. Monroe County, N.Y. March 21, 1975) ..... 18

Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975) ..... 18

Daugherty v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973) ..... 21

Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975) ..... 16

Detainees of the Queens House of Detention v. Malcolm, 73 Civ. 1364 (E.D.N.Y. June 29, 1975) ..... 18

Estelle v. Williams, 425 U.S. 501 (1976) ..... 17, 19

Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978) ..... 13

Funches v. Beame, 73 Civ. 572 (E.D.N.Y. July 12, 1974) ..... 18

Giampetruzzi v. Malcolm, 406 F.Supp. 836 (S.D.N.Y. 1975) ... 21

Hodges v. Klein, 412 F.Supp. 896 (D.N.J. 1976) ..... 21

Houchins v. KQED, ___ U.S. ___, 46 U.S.L.W. 4830 (June 26, 1978) ..... 16

Inmates of Allen County Jail v. Bender, Civ. No. 71 P 32 (N.D.Ind. May 19, 1975) ..... 18

Inmates of Milwaukee County Jail v. Peterson, 353 F.Supp. 1157 (E.D.Wis. 1973) ..... 18

Johnson v. Avery, 393 U.S. 483 (1969) ..... 19

Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) ..... 14, 24

Lambert v. Skidmore, Case No. C 274-135 (S.D. Ohio June 16, 1975) ..... 18

Lanza v. New York, 370 U.S. 139 (1962) ..... 16

Lucas v. Wasser, No. 76-1057, Consent Order (S.D.N.Y. Sept. 30, 1976) ..... 18

Manicone v. Cleary, 74 Civ. 575 (E.D.N.Y. June 30, 1975) ... 18

Marion County Jail Inmates v. Broderick, 74 Civ. 434 (S.D.Ind. April 12, 1976) ..... 18

Miller v. Carson, No. 74-382-Civ.-J-S (M.D.Fla. Jan. 31, 1975) ..... 18

Mitchell v. Untreiner, 421 F.Supp. 886 (N.D.Fla. 1976) ..... 18

O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582 (E.D.Mich. 1977) ..... 18
Owens-El v. Robinson, 442 F.Supp. 1368 (W.D.Pa. 1978) ..... 18
Pell v. Procunier, 417 U.S. 817 (1974) ..... 19
Penn El v. Riddle, 399 F.Supp. 1059 (E.D.Va. 1975) ..... 21
Procunier v. Martinez, 416 U.S. 396 (1974) ..... 17, 18, 19
Rhem v. Malcolm, 371 F.Supp. 595 (S.D.N.Y.), affirmed, 507 F.2d 333 (2d Cir. 1974) ..... 18
United States v. Park, 521 F.2d 1381 (9th Cir. 1975) ..... 20
Watson v. City of Memphis, 373 U.S. 526 (1963) ..... 17
Woods v. Daggett, 541 F.2d 237 (10th Cir. 1976) ..... 19

CONSTITUTIONAL PROVISIONS

First Amendment ..... 2, 7, 17, 18, 19
Fourth Amendment ..... 2, 16, 22
Fifth Amendment ..... 1, 2, 7, 23
Sixth Amendment ..... 2
Eighth Amendment ..... 2, 7, 16
Ninth Amendment ..... 2

OTHER AUTHORITIES

American Bar Association, Tentative Draft on Standards Relating to the Legal Status of Prisoners, 14 Crim.L.Rev. 377 (1977) ..... 24
American Correctional Association Commission on Accreditation for Correctional Institutions, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (August 1977) ..... 24
American Correctional Association, MANUAL OF CORRECTIONAL STANDARDS (1966) ..... 16
American Medical Association, STANDARDS FOR THE ACCREDITATION OF MEDICAL CARE AND HEALTH SERVICES IN JAILS (Draft Spring 1978) ..... 24
American Public Health Association, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (1976) ..... 24



Government Brief on Appeal to the United States Court of Appeals for the Second Circuit, Wolfish v. Levi, Docket No. 77-2035 ..... 4, 11, 17, 24
United States Bureau of Prisons, THE JAIL: ITS OPERATION AND MANAGEMENT (1970) ..... 16
United States Bureau of Prisons Policy Statement No. 7300.13B, Attachment T (June 24, 1971) ..... 19
United States Department of Justice, FEDERAL STANDARDS FOR CORRECTIONS (Draft June 1978) ..... 16, 17, 21, 22, 24
United States Trial Memorandum in Adams and United States of America v. Mathis, M.D.Ala. Civ. Action No. 74-70-S . 13
United States Trial Memorandum in Vest et al. and United States of America v. Lubbock County Commissioners Court et al., N.D.Tex. Civ. Action No. 5-76-53 ..... 13

No. 77-1829

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

GRIFFIN B. BELL, ET AL.,

Petitioners,

-v.-

LOUIS WOLFISH, ET AL.,

Respondents.

---

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## OPINIONS BELOW

The inmates of the Metropolitan Correctional Center ("MCC") adopt the statement of the petitioners ("the government").

## JURISDICTION

The inmates of the MCC adopt the statement of the government.

## QUESTIONS PRESENTED

1. Whether double-celling and overcrowding of pretrial detainees in the conditions prevailing at the MCC are unconstitutional under the Fifth Amendment.

2. Whether a total prohibition on the receipt from outside the institution of books and other reading matter except from the publisher is violative of the First Amendment.

3. Whether routine visual anal and genital searches without probable cause after supervised contact visits are violative of the Fourth and Fifth Amendments.

4. Whether prohibiting a non-disruptive pretrial inmate from observing the search of his cell from a reasonable distance is violative of the Fourth and Fifth Amendments.

5. Whether a total prohibition on the receipt of personal property from outside the institution is violative of the Fifth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The inmates of MCC add to those provisions in the government's petition the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

### A. Prior Proceedings

A pro se petition for writ of habeas corpus seeking relief from alleged unconstitutional conditions of confinement at the New York Metropolitan Correctional Center (hereinafter, "MCC") was filed on November 28, 1975, by the inmates of that institution. Thereafter, The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel for the inmates, and an amended petition was filed asserting that the inmates had been denied their constitutional rights under the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments.

Pursuant to an order dated December 2, 1975, the case was

declared a class action under F.R.C.P. 23(b)(1) and (2). See Wolfish v. Levi, 406 F.Supp. 1243, 1244-1245 (S.D.N.Y. 1976).

The inmates moved for partial summary judgment. After a tour and examination of the MCC, on January 5, 1977, the district judge granted the motion as to several of the issues and, insofar as relevant to the issues raised by the government here, enjoined double occupancy of single-person cells ("double-celling") (see infra at 3) and enforcement of the regulation prohibiting receipt of books and magazines except from publishers -- the "publisher-only" rule (see infra at 7). Wolfish v. Levi, 428 F.Supp. 333 (S.D.N.Y. 1977).

Trial of the remaining issues commenced on February 28, 1977, and continued through March 30, 1977, resulting in a record of testimony of approximately 3,000 pages and several hundred exhibits. The district judge personally visited the MCC on two additional occasions: on March 5 and March 16, 1977.

On September 15, 1977, the district judge rendered a decision on the matters not previously resolved. Of relevance to the issues raised in the government's petition, the court prohibited routine visual anal and genital searches of all inmates after contact visits except when based on probable cause; ordered that pretrial inmates be permitted to observe from a reasonable distance the routine and unlimited searches of their cells except where good reason prevented it; and enjoined the institution's blanket prohibition of receipt by inmates of packages, requiring that reasonable regulations for such receipt be established. The government appealed to the court of appeals, which affirmed the district court's order on these issues.

## B. Double-Celling

Although the MCC was built primarily as a pretrial detention facility (App. G at 202a, 213a; see App. F at 74a)* intended to house one prisoner in each of 389 cells (App. G at 203a),* in practice the institution had designated 121 of the cells for the housing of two inmates (App. G at 203a;** A.51-81***). Based on the papers filed on the summary judgment motion and on the judge's personal observation of the physical conditions of the cells themselves and the consequences of overcrowding on the multipurpose rooms which are the heart of the modular living system at MCC, the judge concluded that housing two people in these one-person cells was unconstitutional. (App. G at 206a-209a.)

> At the core of the planning and design of the MCC was the functional unit management concept, in which "all activities and services for detained persons will, whenever possible, be provided directly in the unit where these persons are billeted."
>
> Government Brief on Appeal to the Second Circuit, Docket No. 77-2035 (hereinafter "Brief on Appeal") at 8.****

In fulfillment of this scheme, virtually all activities of the prison day are consigned to the multipurpose room of each living unit at the MCC, which serves all the inmates housed in the 48 adjoining cells (App. G at 201a-202a). Inmates are not

*References preceded by "App." are to the appendices to the government's petition for writ of certiorari.

*With one person to a cell and each dormitory housing an intended 10 persons (App. A at 21a), the MCC was expected to house 449 people (Petition for writ of Certiorari at 6, hereinafter "Pet."). In his affidavit, the warden acknowledged that the population went up to an "average of well below 600" and that, though a projected population of 620 had been avoided up to this time, he could not accurately predict what the population might increase to in the future (A.89).

**Double-celling was only one of the three ways in which the population of MCC was increased by the government beyond the institution's design capacity. The population of the dormitory area was increased to 200% of capacity -- from 60 to 120 inmates -- and housed people, not on an occasional basis (see Pet. at 7), but on a regular and continuing basis, in commons areas and on balconies. The district court enjoined both of these latter types of housing, limiting the dormitory population to its design capacity of 10 inmates per dormitory unit (App. F at 125a-129a). The court of appeals sustained the order, except that a remand was ordered to determine whether the dormitories might provide constitutionally valid housing for some number of inmates between 10 and 15 (App. A at 22a-23a). The government does not seek the Court's review of these orders.

***References preceded by "A" are to the joint appendix filed in the court of appeals.

****The government itself emphasizes that the modular concept was intended, among other purposes, to afford some privacy to inmates by providing individual cells (Brief on Appeal at 10).

permitted to visit the general library or the commissary (Stipulation of Facts A.2532; App. F at 111a). The institution contains no recreation yard, no central auditorium, no indoor gymnasium, no chapel, no dining room, no shop, no industry, and no educational facility (App. G at 208a n.6; App. F at 91a; A.2532). Rather, any recreational, educational, or religious activity which may take place, as well as telephoning, showering, eating, television watching, and physical exercise occur in the modular unit. Visiting takes place in an adjoining but separate room. Inmates leave the modular unit only for court appearances, infirmary or medical visits, attorney visits, and, weather permitting, one hour of daily recreation on the roof (Stipulation of Facts A.2532; App. A at 5a; App. F at 80a).

The judge found that the multipurpose room was designed and furnished for use by the designated number of single-room occupants (App. G at 207a). The excess population made the multipurpose area oppressive and "congested, noisy, unworkable for their intended uses," and he concluded that overcrowding added to the pressure on the inmate to return to his cell for activities (App. G at 207a).

As for the cells themselves, the district judge, again based on uncontradicted information, outlined the conditions created when two people were housed in an area designed and constructed, according to Paul Silver, the architect of MCC, to house one (App. G at 205a).* The judge found the use of bunk beds inconsistent with the design of the 75-square-foot room. With the use of bunks, cold air from a vent blew directly on the upper bed about a foot above body level. To avoid this, the inmates blocked the air vents, producing musty and foul-smelling rooms (App. G at 206a-207a). The district judge found that, whereas one inmate had two storage drawers under a single bed,

*The architect stated:

> [T]here is an absoluteness of a room which is designed for one person, and to try to convert it into a two-person room, it's a clear violation of the capability of that space....
>
> (App. G at 205a).



the use of bunks resulted in no drawer being available or the presence of only one for use by both residents (App. G at 207a). He also found that both the single shelf for toiletries and a second shelf for other items were inadequate for two people, and that there was no place to hang clothing (App. G at 206a). With the room containing also a wash basin, an uncovered toilet, an extension lamp, a desk, and one or two chairs, he determined that walking space was limited to a narrow aisle running the length of the room (App. G at 203a). He noted that inmates were locked into these inadequate cells for at least seven and one-half hours during the night as well as for the daily head counts (App. G at 208a). Further, under the modular confinement concept, these cells are the only place to which an inmate may escape from the noisy, congested, and "useless" multipurpose rooms.

The judge found that, based on the "plain visual evidence,"

> [t]here is no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet....
>
> (App. G at 206a).

He concluded:

> The open toilet, at mealtimes and in the middle of the night, remains a stark centerpiece. The fundamental denials of decency, privacy, personal security, and, simply, civilized humanity are all in essence the same when two people are thrown into single prison cells like these. The qualities of threat, nausea, and degradation are visible and palpable for any observer.
>
> (App. G at 211a).

In the summary judgment order, the district judge prohibited double-celling* (App. D at 50a).

The court of appeals affirmed the findings of fact and conclusions of law, observing that double-celling was dehumanizing and an infringement on minimal privacy and personal dignity, and resulted in intolerable demands being made by the increased

*The judge's order permitted double-celling for up to 10 days upon certification by the warden of an emergency (App. D at 51a).

population on the commons areas facilities* (App. A at 17a-18a). The court of appeals rejected a claim that fiscal conditions and administrative convenience permitted the unconstitutional overcrowded conditions (App. A at 12a, 19a).

C. The Publisher-Only Rule

The MCC imposed a prohibition on receipt of books, magazines, and other written material from any source other than publishers and book clubs.** The government argued below, as here, that the prohibition, commonly known as "the publisher-only rule," is necessary to prevent the entry of contraband into the institution (Pet. at 36).

The district court found the prohibition a violation of the First and Fifth Amendments (App. G at 215a) and rejected as inadequate the justification proffered for the prohibition. However, recognizing that a legitimate correctional interest existed, the judge ruled that all incoming packages and their contents might be inspected and searched (App. G at 223a-224a).

The court of appeals affirmed, stating, "the 'publisher-only' rule severely and impermissibly restricts the reading material available to inmates ... [and is] inconsistent with both the first amendment and due process" (App. A at 26a).

D. Visual Anal and Genital Searches

Following every contact visit, whether with attorney, family member, or friend, made by an MCC inmate, the inmate was subject to a strip search. This procedure required that, under the observation of a correctional officer, the inmate remove all his clothing, display his hands and armpits, open his mouth, lift

*The issue of double-celling for sentenced prisoners in cells of larger dimensions was remanded to the district court for findings under the Eighth Amendment (App. A at 17a, 20a).

**The government's claim that books may now be ordered by inmates from bookstores (Pet. at 36) is not in the record and has not been presented to either the district court or the court of appeals. If the government believes that any unilateral change in its procedures entitles it to a modification of the existing order, the appropriate remedy is an application to the district court.



his genitals, and display the soles of his feet. As part of this procedure, the inmate is also required to bend over and spread his buttocks for a visual anal inspection. For female inmates, the inspection includes as well a visual vaginal inspection.

The district judge, although finding the strip search "unpleasant, embarrassing, and humiliating" (App. F at 149a), accepted the opinion of the Bureau of Prisons that a "strip search may serve as a deterrent to people planning to secrete and import forbidden things" (App. F at 151a) and sustained the strip search. However, he found the visual anal and genital searches to be inherently repulsive and shocking (App. F at 153a):

> [T]he bending over to spread buttocks for anal inspection plunge[s] the reaction [of the inmate to the search] to a level of deep degradation and submission. The postures [the inmates] are compelled to assume are calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict.
>
> (App. F at 149a).*

He found the searches not rationally related to security interests, and thus unreasonable (App. F at 153a). The facts which demonstrated that the search was unreasonable were that, upon entering the institution, the visitor and his clothing were thoroughly searched by magnetometer and other devices; that the admissions officer could have prevented visitors from taking any item in their possession to the visiting room; that the inmate was clothed in a brightly-colored, one-piece jumpsuit that zipped up the front and which would have to be removed from at least the torso in order to secrete anything in the anal or genital

*The district court found that there had been incidents of "insultingly suggestive remarks and banal but terrifying expressions of aggression," and credited inmate testimony that such incidents had caused them to forego visits (App. F at 149a).

cavity;* that the social visitor and the inmate were in full view of a correctional officer at all times during the visiting period; that the inmate was not permitted use of the toilet facility in the visiting room, and the visitor could not use the facility without first notifying the correctional officer on duty; that weapons and other dangerous instruments were discoverable by metal detectors and other equipment similar to that in common use at airports; and that urine tests were routinely given to detect the use of drugs (App. F at 130a-131a, 134a-135a, 151a-153a).

Significantly, the district court found that, based on clear and uncontradicted evidence, even if an inmate were to insert an object beyond the anal sphincter, it would be undetectable by the visual search conducted by the officer, thus rendering such a visual examination useless (App. F at 150a).** Further, the evidence showed that anything held between the buttocks would cause an easily detectable abnormal gait (A.773-774), making the search superfluous. Based on the specific factors in this case, the district court concluded:

> In all the circumstances, the demands of security are amply satisfied if inmates are required to disrobe, to have their clothing subjected to inspection, and to present open hands and arms to demonstrate the absence of concealed objects.
>
> (App. F at 153a).***

On appeal, the court of appeals affirmed the district court:

> The gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility. To speak plainly,

*The district judge found these uniforms to be unconstitutional for use by pretrial inmates (App. F at 165a-169a). He did not consider the uniforms in evaluating the unreasonableness of the government's assumptions concerning the need for visual searches. However, the court of appeals reversed the district court's holding on uniforms (App. A at 34a), so they now become relevant to consideration of the reasonableness of such searches.

**The scientific evidence was confirmed by the fact that no anal inspection has ever revealed any contraband, and only once did a vaginal inspection reveal an attempt to conceal drugs (App. F at 150a).

***The judge permitted the searches to be conducted on probable cause (App. F at 153a).



> in the circumstances presented by this record, the procedure shocks one's conscience.
>
> (App. A at 30a).

## E. Pretrial Detainees' Observance of Random, Frequent, and Unannounced Searches of their Cells

The MCC administration randomly and frequently searches either groups of cells or individual cells. Inmates are not permitted to observe searches of the units, and are permitted to observe searches of the individual cells in the apparently standardless discretion of the correctional officer. Searches sometimes occur after the inmate is locked into his room, in which case he is ordered to leave the room while the search takes place (T.1078; App. F at 154a; A.92-93).*

The evidence below also showed that, although the MCC staff is directed to leave the searched rooms as they found them (A.1241), correctional officers often leave the searched rooms in disarray, with personal items, bedding, and legal papers scattered about (App. F at 154a).**

The government asserted below that it was necessary to exclude the inmates from observing the search in order to prevent the destruction of contraband before it could be seized, and because witnessing searches would antagonize inmates. The court found that the present practice of excluding inmates already raised tensions and hostilities (App. F at 156a) which would be reduced by the remedy (App. F at 154a-155a) and that destruction of property would be prevented by having the inmate

*References preceded by "T" refer to pages of the trial transcript.

**Prior to the district court's order, anything found in a prisoner's cell could be seized by a correctional officer. No receipt for the seized item was given to the inmate, and the property seized was turned over to the chief correctional officer for destruction or, if money, for deposit in the Bureau of Prisons fund (Stipulation of Facts at 55).

In the summary judgment, the district court ordered that receipts be given for property seized; in the final judgment, the court directed that a procedure be established by the institution for a hearing to determine whether the seized property was contraband and how the property should be disposed of (App. E at 72a; App. D at 62a).

remain at a reasonable distance from the cell.

The court of appeals agreed that

> ... the practice in actual operation, constituted a "regime of absolute and unquestionable tyranny."
>
> We see no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege to grant him and reassures the detainee's already diminished sense of control over self, that he still has some small private domain, while at the same time not interfering with the institution's security concern and the removal of possible contraband.
>
> (App. A at 31a; footnote omitted).

F. Receipt of Packages

Except for one food package allowed at Christmas (Stipulation of Facts at 56; T.490), the government enforces an absolute prohibition on receipt of all packages by all inmates at the MCC. No personal effects or food may be brought into the institution from outside.

The justifications given below by the government for this prohibition were exclusion of contraband; the prevention of fighting, stealing, and extortion among inmates; narrowing the gap between those inmates with property and those without; and avoidance of storage and sanitation problems (see Brief on Appeal at 99-100).

The district judge found this justification "arbitrary and unacceptable" (App. F at 166a), emphasizing that the government's own practice of selling items from the commissary, including some at substantial cost (App. F at 164a),* belied any real concern about fighting, stealing, and extortion. He concluded that it was arbitrary to permit those inmates with funds to buy from the commissary and to deny those without money the opportunity to receive from outside the institution similar items (App. F at 165a). Sanitation and storage concerns were held inconsistent with the institution's own sale of food (App. F at 165a). Entry of

*These goods include snack foods, cosmetic items, batteries, clothing, radios, and watches.



contraband may easily be prevented by a search of incoming packages and by control of their size and contents (App. A at 33a).

The court of appeals sustained the judgment, requiring reasonable regulations regarding packages (App. A at 33a). Based on the evidence presented at trial, the court of appeals noted that other institutions housing inmates needing close custody have far more liberal rules concerning packages than did the MCC (App. A at 32a).

## REASONS FOR DENYING THE WRIT

A. The five conditions of confinement raised in the petition are unconstitutional under any of the tests, and therefore this case is an inappropriate vehicle for the resolution of the issues presented.

In its petition the government argues that three circuits have formulated differing standards for evaluating the constitutionality of restrictions of pretrial detainees. These variations, it is argued, necessitate review (Pet. at 17-21).

It is our view that this case is an inappropriate vehicle for meaningful resolution of whatever actual differences, if any, the language in these cases may be thought to engender. The opinions and lengthy record in this case compel the conclusion that under any of the "standards" expressed in these three cases, the specific conditions of confinement for which the government has chosen to seek review would be held unconstitutional.

The standard articulated below is that pretrial detainees may be subjected only to those restrictions and privations inherent in confinement or justified by compelling necessities of jail administration.* Once such necessity is established, the means used to ensure legitimate interests in security must be reasonable (App. A at 12a, 13a).

*The government's reading that the decision below requires that every restriction imposed upon pretrial detainees be inherent in that confinement or supported by compelling necessity (Pet. at 15, 21, 22, 23, 24) is incorrect. The court of appeals states clearly that relief should be afforded detainees when "substantial deprivations not compelled by administrative necessity, are discovered" (App. A at 2a; emphasis added).

The standard under Campbell v. McGruder, Docket No. 75-1350 (D.C. Cir. March 30, 1978), although linguistically variant, articulates the same substantive principle:

> [A]lthough infringements on liberties not deemed fundamental might not in general be subject to the strictest scrutiny [citations omitted], each deprivation of the jail environment renders pretrial detention more severe as punishment and thus further violates the presumed innocence of the pretrial detainee.... Therefore each restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration.

Slip op. at 16-17.

The First Circuit's decision in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978), which focuses on "whether the actions of jail authorities are arbitrary or capricious; whether they are lacking in a reasonable relationship to the limited purpose of confinement; and whether they are otherwise in accordance with law" (570 F.2d at 371),* is viewed by the government as substantially more stringent and the one which should be adhered to (Pet. at 25 and n.21).**

Whichever standard is applied for review of the specific governmental actions presented by the petition, however, that conduct is unconstitutional. The findings below manifest conclusions that in the five specific areas of prison regulation

*Relying on other parts of Feeley v. Sampson, supra, 570 F.2d at 371, the government equates "the reasonable relationship" standard to one based on minimum standards of humanity and decency (Pet. at 28-30). However, there, the court was addressing a strict application of equal protection analysis; it rejected the idea that any invalid restriction on convicted people would be automatically unconstitutional when applied to detainees, but concluded that it was appropriate to enjoin enforcement as against both convicted people and detainees of a restriction which fell below minimum standards of humanity and decency.

**The government's espousal of the reasonable relationship standard in this case -- one of the few involving a federal prison -- is contrary to the position taken by the United States in other litigation when state detention facilities are involved. In those cases, the government has urged adoption of the Second Circuit standard. United States trial memorandum in Adams and United States of America v. Mathis, M.D.Ala. Civ. Action No. 74-70-S at 10-12; United States trial memorandum in Vest et al. and United States of America v. Lubbock County Commissioners Court et al., N.D.Tex. Civ. Action No. 5-76-53 at 6-8.



raised by the petition, the challenged governmental conduct was either arbitrary and capricious or lacked any reasonable relationship to the limited purpose of confinement. The challenge by the petition to the decision on each of the five areas -- double-celling (see infra at 15-17); the publisher-only rule (see infra at 17-20); visual anal and genital searches (see infra at 20-22); a detainee's presence during the search of his cell (see infra at 22-23); and receipt of personal property (see infra at 23-24) -- is little more than an attempt to relitigate the findings below.

The government insists that the courts failed to give sufficient deference to the opinions of correctional officials (Pet. at 18, 24-25 and n.20, 34, 41). However, the decisions below, and the record upon which they are based, demonstrate the attention, consideration, and deference given to correctional officers testifying for the government. The opinions expressed were rejected only where the "beliefs were unreasonable" or the conditions imposed upon the detainees were an "exaggerated" response to reasonable beliefs (see Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 128 (1977)).

Indeed, the deference accorded correctional expertise in management of the MCC is amply demonstrated by the court of appeals' refusal to interfere with precise regulation of telephone accessibility, social visiting hours, and commissary orders (App. A at 16a-17a and n.16).* The court also refrained from any interference with regulations as to the contents of packages or property which an inmate may receive and retain in his cell (App. A at 32a-33a). The court deferred to correctional judgment in the matter of detainee uniforms and clothing, despite its own belief that identification of inmates could be achieved in a less degrading manner (App. A at 34a).

As for the issues now contested by the government in its

*These issues are not raised by the certiorari petition.

petition, the evidence warranted no decision other than the one rendered by the court of appeals, irrespective of the "standard" the government seeks to apply.

B. Double-Celling

The government's contention that a per se prohibition on double-celling (Pet. at 29 n.25, 30) was imposed based solely on an institutional privacy interest (Pet. at 28) and in disregard of administrative and fiscal concerns (Pet. at 28-29) is erroneous.

While there is considerable support for prohibiting double-celling solely on the basis of rated capacity, the courts below based their judgments on much more (App. G at 206a-209a). For example, the court considered the testimony of the architect of the MCC that he designed each cell for one person, as well as the effect of double-celling on individual cells and the multi-purpose areas of the institution (App. G at 205a).

After viewing the prison, the district judge found not only that double-celling deprived an inmate of privacy, but that actual conditions were simply inadequate for the needs of two persons. The district judge noted that the size of the cells allowed only 37 square feet per person when used to house two people; that there was a lack of walking space and storage area for basic toilet items and clothing; and that the air vents were located so that they blew cold air only one foot from the inmate who slept in the upper bunk (App. G at 203a, 206a-207a). There was no place for one person to be alone or "outside another's toilet (App. G at 206a).

Overcrowding, the court concluded, also rendered planned commons areas "unworkable for their intended uses," and the impact of overcrowding on the multipurpose rooms diminished the significance of the shorter period for lock-in in cells (App. G at 207a, 208a). These factors led to the ultimate determination that there was a denial of "decency, privacy, personal security, and, simply, civilized humanity ... when two people are thrown



into single prison cells like these" (App. G at 211a). The court of appeals agreed (App. A at 17a-18a).*

There is a peculiar irony to the government's argument in support of double-celling because the government has been prominent in its criticism of that very practice in state and local facilities.**

The government claims an "individual's generalized interest in privacy lacks substantial weight during institutional confinement in a jail" (Pet. at 28). Lanza v. New York, 370 U.S. 139, 143 (1962), is the authority relied upon. First, Lanza is inappropriate because the decision below was based on grounds broader than the single factor of privacy.*** It was premised on findings that double-celling conditions of the MCC were degrading (App. G at 211a) and an infringement on personal dignity (App. A at 17a-18a). Second, Lanza involved the issue of whether eavesdropping by prison officials on a conversation between a convicted person and his brother violated the Fourth Amendment. Nothing in that case implicates a concern with prison conditions involving the forced confinement of inmates

---

*The court of appeals remanded to the district court for further findings under the Eighth Amendment the question of use of 21 larger cells to house sentenced prisoners, some of whom were members of the work force (App. A at 20a; see App. G at 204a).

**The government's condemnation of double-celling arises because the practice overtaxes the facility, overworks personnel, and prevents minimum standards from being met. United States Bureau of Prisons, THE JAIL: ITS OPERATION AND MANAGEMENT at 102 (1970); see also American Correctional Association, MANUAL OF CORRECTIONAL STANDARDS at 49 (1966) (the Bureau of Prisons participated in the preparation of these standards, see Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 396 n.5 (2d Cir. 1975)). Furthermore, the United States Department of Justice, FEDERAL STANDARDS FOR CORRECTIONS (Draft June 1978) (hereinafter, "Draft Federal Standards") provide that all cells rated for single occupancy actually house only one inmate (Draft Federal Standards - Physical Plant Standard 002 at 10) and that these cells have at least 60 square feet of floor space (id., Standard 004 at 10). The position taken by the Department of Justice in this case is in direct conflict with its own draft standards intended to provide "guidelines for the decent and humane operation of ... corrections and detention facilities." Draft Federal Standards, Introduction at 2.

***The Court recently noted in another context that inmates have a right to privacy which will be protected. Houchins v. KQED, ___ U.S. ___, 46 U.S.L.W. 4830, 4831 n.2 (June 26, 1978).

in overcrowded conditions for protracted periods.

Whatever administrative convenience in double-celling is claimed by the government to exist (Pet. at 28-29), such an assertion has never been deemed to override constitutional interests. Estelle v. Williams, 425 U.S. 501, 505 (1976; Procunier v. Martinez, 416 U.S. 396, 421 (1974). Similarly, it has long been recognized that protection of constitutional rights "cannot be made dependent upon any theory that it is less expensive to deny them than to afford them." Watson v. City of Memphis, 373 U.S. 526, 537 (1963). The assertion that the government is now prevented from fulfilling its own long-planned modular living design for the MCC (see Brief on Appeal at 6-9) by fiscal restraints is absurd in light of the fact that the Department of Justice is asking others in the country to abandon double-celling despite the possible cost, and is planning to have those incarcerated in federal prisons held in single-person cells:*

> [T]he Department of Justice must -- if the standards are to have any meaning -- be willing to embrace the goals and objectives set forth in the standards and apply those standards to its own correctional programs.... [I]t is my intention to ask the Bureau of Prisons to submit a plan, which delineates each standard which is not currently met, the resources and steps which will be necessary to meet it and a reasonable time for its accomplishment.
>
> Draft Federal Standards, Introduction at 2.

C. The Publisher-Only Rule

Conceding, as it must, that detainees possess a First Amendment right to access to books, magazines, and other reading materials, the government maintains that the court below

*Under the Draft Federal Standards, costs do not prevent an end to double-celling, but will be merely a factor in determining the plan of implementing double-celling. It is recognized that the time and expense involved in construction or renovation of a physical plant to end double-celling may require "a longer period of time" than other changes, but responsible officials are expected to "immediately develop a plan for meeting the standards" within a reasonable time. Draft Federal Standards at 9.



erred in striking down the publisher-only rule because such a rule did not "meaningfully interfere" with that right. In fact, the rule severely limits access to reading materials, particularly to indigent inmates, and constitutes a serious abridgement of First Amendment rights.

Books and magazine subscriptions cost money. As the district court noted, indigent inmates are not situated to order such items (App. F at 215a). The rule also assumes that the inmate has knowledge of publishers and their addresses, that he can communicate easily with publishers or that family or friends are in a position to assist him in dealing with publishers, and that the order will be filled and the book delivered during his stay at the MCC.

Thus, for the vast majority of detainees, the publisher-only rule, by prohibiting the receipt of reading materials from their most likely source of family and friends, significantly infringes on First Amendment access to ideas. It is not surprising that such prohibition has been ill-received by the lower federal courts.*

These practical factors of access and expense are of great weight in determining whether constitutional protections are denied. Thus, in Procunier v. Martinez, supra, 416 U.S. at 419, the prohibition on use of law students in prison was held to be a denial of the right of access to the courts where the location

*Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975); Rhem v. Malcolm, 371 F.Supp. 595, 634 (S.D.N.Y.), affirmed, 507 F.2d 333 (2d Cir. 1974); O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582, 600 (E.D.Mich. 1977), 446 F.Supp. 436, 443 (E.D.Mich. 1978); Owens-El v. Robinson, 442 F.Supp, 1368, 1387-1388 (W.D.Pa. 1978); Mitchell v. Untreiner, 421 F.Supp. 886, 901 (N.D.Fla. 1976); Marion County Jail Inmates v. Broderick, 74 Civ. 434 (S.D.Ind. April 12, 1976); Lucas v. Wasser, No. 76-1057, Consent Order at 6 (S.D.N.Y. Sept. 30, 1976); Benjamin v. Malcolm, 75 Civ. 3073 S.D.N.Y. Aug. 14, 1975); Manicone v. Cleary, 74 Civ. 575 (E.D. N.Y. June 30, 1975); Detainees of Queens House of Detention v. Malcolm, 73 Civ. 1364 (E.D.N.Y. June 29, 1975) (summary judgment without opinion); Lambert v. Skidmore, Case No. C 2 74-135 (S.D. Ohio June 16, 1975) (consent decree); Inmates of Allen County Jail v. Bender, Civ. No. 71 F 32 (N.D.Ind. May 19, 1975) (consent decree); Miller v. Carson, No. 74-382-Civ.-J-S, Order and Preliminary Injunction at 14 (M.D.Fla. Jan. 31, 1975); Cooper v. Morin, Index No. 74 1411 (Sup.Ct. Monroe County, N.Y. March 21, 1975); Funches v. Beame, 73 Civ. 572 (S.D.N.Y. July 12, 1974); Inmates of Milwaukee County Jail v. Peterson, 353 F.Supp. 1157, 1168-1169 (E.D.Wis. 1973); Collins v. Schoonfield, 344 F.Supp. 257, 281 (D.Md. 1972).

of the prison at a distance from inmates' lawyers prevented the lawyer from conferring with his client or where the inmate was unable to pay the costs of the lawyer's trip to the prison. The publisher-only rule similarly imposes invalid constraints on First Amendment rights.

Pell v. Procunier, 417 U.S. 817 (1974) (Pet. at 36), furnishes no support for the government's position. There, the prohibition on individual personal contact between inmates and reporters did not violate the First Amendment because communication between them was otherwise available through the mail or third persons. Id. at 824-826. No adequate alternative is available when the publisher-only rule is involved. See Procunier v. Martinez, supra, 415 U.S. at 421; Johnson v. Avery, 393 U.S. 483, 488 (1969).*

The government's contention is that the publisher-only rule was essential to security interests and should have been respected by the courts below. There was no denigration of that interest. The court of appeals held only that the prohibition went far beyond what was required to protect the security interest because a search of incoming material could easily achieve that end (App. A at 26a-27a; n.27).** The government's own proposed standards corroborate the court's view that the publisher-only rule was overbroad. Under these standards, an inmate may

*The court of appeals rejected the government's contention that the MCC library provided a reasonable alternative, finding that inmates may choose to read books and magazines not in the library (App. A at 27a). The decision was correct because inmates are not permitted to go to the library, but must request books from a list and await their delivery. The MCC library is stocked primarily through donations of books. Newspapers are available only through the commissary for payment, and magazines are obtained from the dead letter section of the Postal Service. Books on the units are stripped paperbacks left over from drugstore racks (App. F at 108a).

**As both lower courts noted (App. A at 26a n.26; App. F at 217a), Woods v. Daggett, 541 F.2d 237, 240 (10th Cir. 1976), is inapposite on these facts. Woods was concerned with the federal penitentiary at Leavenworth, Kansas -- a maximum security prison where there had been bizarre efforts to carry contraband and which housed 2,000 convicted inmates with long sentences and significant prior records (Attachment T to Bureau of Prisons Policy Statement No. 7300.13B, June 24, 1971). The security precautions needed at Leavenworth are far different from those needed at a pretrial detention center such as the MCC. Further, to the extent that searching constitutes an administrative inconvenience, it is not a justification for the prohibition. Estelle v. Williams, supra, 425 U.S. at 505.



receive publications from any source, subject to search and inspection, except where there is clear and convincing evidence to justify limitations (Draft Federal Standards - Mail and Visiting Standard 002 at 63). There is no valid reason to disturb the court of appeals' judgment.

D. Reasonableness of Searches and Seizures

1. Visual Anal and Genital Searches

The government complains that the prohibition of visual anal and genital searches of inmates after contact visits except on probable cause is an unwarranted interference with the necessity to protect against introduction of contraband and weapons (Pet. at 40). The court concluded that the government's objectives could be achieved by less drastic means, including the security measures already in effect.* During a contact visit, both inmate and visitor are observed by a correctional officer through the visiting room's glass walls (App. F at 131a). All inmates are dressed in brightly-colored one-piece jumpsuits, zippered in front (A.528), and to insert any item into a genital or anal cavity, removal of the uniform from at least the torso would be necessary (see A.925). The visitor and his belongings are subject to careful scrutiny by electronic devices before the visitor leaves the lobby; the visitor may not carry any packages into the visiting room; the inmate may not use the visiting room's toilet, and the visitor may do so only upon requesting the key from a correctional officer (App. F at 130a, 131a, 134a, 151a; App. A at 15a). Thus, there is virtually no opportunity

*United States v. Park, 521 F.2d 1381, 1382 (9th Cir. 1975), demonstrates this very distinction. There, a visitor attempted to introduce into the institution a quantity of drugs secreted in a balloon, intended to be inserted into an inmate's rectum. The scheme was apparently detected by procedures, not involving an anal search, which disclosed the package before it could be concealed by the inmate.

for anal or vaginal smuggling.* It is also significant that uncontradicted expert opinion was that the visual search would not disclose items concealed beyond the anal sphincter (App. F at 150a) and that if items were held between the buttocks, that fact would be disclosed by the unusual gait which would result (A.773-774).

Thus, the government's position that contact visits may permit introduction of contraband is not in dispute, having been fully accepted by both lower courts. In prohibiting the routine imposition of anal and genital searches, the district court and the court of appeals took into account the extensive security precautions available to and used by MCC officials, and in addition, permitted the continuation of the very extensive strip search, including removal of all clothing and the raising of arms and the display of hands and soles of feet. Such a search is conducted upon every inmate following every contact visit. Clothing is thoroughly examined as well (App. F at 153a).**

The Department of Justice itself has adopted the approach taken by the courts here. Under the Draft Federal Standards, visual inspection of body cavities may be conducted only where there is real suspicion "which may be created ... [by] re-entry

---

*The government's reference to two instances is imprecise. Only one visiting room incident occurred (A.1442), and the district court considered it inadequate to justify the search. As to the second incident, there is nothing in the record to show that the inmate had come from the visiting room (A.1447-1450).

**The cases cited by the government as constituting a division of authority involve significantly different factual contexts from the MCC's closely observed and regulated visits. Thus, the cases reflect the view that the searches prohibited in this case may be reasonable in other contexts. Daugherty v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973) (no connection with contact visit; a rectal examination given by a physician's assistant to an inmate being removed from a maximum security prison where there were many known instances of contraband and weapons concealed in the rectal cavity); Bell v. Manson, 427 F.Supp. 450 (D.Conn. 1976) (search after a trip outside the institution to court); Hodges v. Klein, 412 F.Supp. 896, 901 (D.N.J. 1976) (search after a totally private contact visit); Giampetruzzi v. Malcolm, 406 F.Supp. 836 (S.D.N.Y. 1975) (anal searches not indicated by the court, but strip searches justified because the inmates were categorized as high security risks after a due process procedure); Penn El v. Riddle, 399 F. Supp. 1059 (E.D.Va. 1975) (items of contraband found in clothing or work area of inmate just prior to search); Bijeol v. Benson, 404 F.Supp. 595 (S.D.Ind. 1975) (no facts as to circumstances of searches).



into general population in a secure facility from a visiting room where there is contact visiting that is not constantly monitored." Id., Security and Control Standard 013 at 37. At the MCC, contact visits are monitored, and therefore, under the government's own standards, routine searches are not necessary.

2. Inmates' Presence at Searches of their Cells

The court of appeals held that under the Fourth Amendment it was unreasonable to prohibit pretrial detainees from observing searches of their rooms from a reasonable distance. The government claims that there is no authority for anyone, free or in custody, to watch a search, and that the courts below failed to give appropriate weight to testimony concerning security interests (Pet. at 40-41).

Again the issue is misconceived. The question is not whether an individual has the right to observe a search, but what, under the circumstances, constitutes a search conducted in a reasonable manner. The prison's complete and legitimate power to search thoroughly a detainee's cell and all his belongings, at any time and without cause or reason, is unique in the realm of governmental power. The evidence (A.584-586; A.625; A.1033-1034) established that frequently inmate belongings, including their legal papers, were "not treated with tenderness;" that officers who rummaged through clothing drawers and possessions left them in disarray; and that such conduct gave rise to a legitimate belief by inmates that searching correctional officers either stole or removed possessions without authority (App. F at 154a). Preclusion of inmate observation of such routine searches, in the view of the court of appeals, constituted a regime of tyranny (App. A at 31a).

The government countered with the argument that removal of the inmate prevented transfer of contraband and unnecessary friction between the inmate and the searching officer (A.1240-1241). The means adopted to secure legitimate security interests was, as elsewhere, exaggerated and overbroad. The court of appeals

noted that the inmate could easily be held at a reasonable distance (App. A at 31a) which would preclude removal of the property. The difficult inmate could properly be removed from the scene (App. A at 32a).

Far more serious, in the eyes of the courts below, was adherence to the institution's own goal that inmate property be preserved and respected "as much as possible" (App. F at 155a). The disregard shown by correctional officers to inmate property warranted by the evidence was wholly contrary to MCC policy (A.1241), as well as due process. Inmate presence was deemed an important means of curbing such abuse as well as providing the ancillary benefit of limiting accusations of theft (App. F at 155a), thereby reducing existing tensions.

E. Receipt of Packages

The MCC prohibited entirely receipt by inmates of any package with the exception of a single food package at Christmas. The government defends the restriction on the grounds that it violates no constitutional right and is not arbitrary (Pet. at 34). However, as the government acknowledges (Pet. at 22), the due process clause is violated by restrictions that lack any substantial relation to the objective sought. As found by the court, the evidence established that the package prohibition was nothing less than arbitrary and capricious (App. F at 163a-164a). The record demonstrates that the "dire predictions" of the government witnesses were unsupported by the evidence and belied by experience and the government's own self-contradictions (App. F at 162a). The court of appeals agreed (App. A at 32a).

Since inmates with commissary funds could purchase and keep in their cells a host of items, such as food, clothing, radios, tobacco, and toiletries,* the court found the government's fear

*Some items were quite costly, such as sneakers priced at $18 and radios at $27 (App. F at 164a). As with reading material, indigent inmates are far more dependent for these items on relatives and friends than on their own financial resources.



of storage and sanitation problems from package receipt inconsistent. Further, given the availability of these items in the institution, the government's claim that prohibition on packages was essential to the prevention of inmate extortion and theft was also deemed baseless.

The courts below observed that other prisons -- even those housing known security risks -- have permitted receipt of some packages and that common protective measures are available to search any packages allowed to enter the institution* (App. A at 32a; App. F at 163a-164a). Thus, the courts accurately assessed the prohibition on all packages as a means for excluding contraband to be an overbroad restriction. See Jones v. North Carolina Prisoners' Union, supra, 433 U.S. at 133.

* * *

Finally, it must be noted that, pursuant to the urgings of the Court, responsible and informed groups throughout the United States have recently undertaken to deal with prison problems and to formulate standards for the treatment of prisoners.** Well after the commencement of this case in November 1975, the Attorney General established a Federal Corrections Task Force to create a federal correctional policy (Brief on Appeal, fn. at 29). The Draft Federal Standards, prepared by members of the Department of Justice,*** was promulgated in June 1978. Of significance is that the Draft, which hoped to "have relevance ... to the litigating divisions of the Department of Justice" (Introduction at 3), adopts standards contrary to positions taken by the government in this petition.

*The court of appeals expressly noted that the correctional officials were to determine contents and volume of such packages.

**American Medical Association, STANDARDS FOR THE ACCREDITATION OF MEDICAL CARE AND HEALTH SERVICES IN JAILS (Draft Spring 1978); American Public Health Association, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (1976); American Bar Association, Tentative Draft on Standards Relating to the Legal Status of Prisoners, 14 Crim.L.Rev. 377 (1977); American Correctional Association Commission on Accreditation for Correctional Institutions, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (August 1977).

***The Justice Department group which drafted the proposed federal standards included Norman Carlson, Director of the Bureau of Prisons.

These developments make it clear that there is a substantial movement on the part of concerned persons to reform the process and to change the realities of practice. These changes may well make it unnecessary for the Court ever to decide some or all of the issues presented by this case. Moreover, even if the issues must ultimately be resolved by the Court, the experience drawn from applying and responding to the new standards will provide the Court with practical guidance.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorneys for Respondents.

MICHAEL B. MUSHLIN,
JOHN BOSTON,
Of Counsel.

Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

No. 77-1829

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

GRIFFIN B. BELL, ET AL., PETITIONERS

*v.*

LOUIS WOLFISH, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE PETITIONERS

---

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

KENT L. JONES
*Assistant to the Solicitor General*

SIDNEY M. GLAZER
KATHLEEN A. FELTON
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Constitutional and statutory provisions involved | 3 |
| Statement | 4 |
| Summary of argument | 16 |
| Argument | 22 |
| I. Double bunking of pretrial detainees in the residential rooms at the Metropolitan Correctional Center has not been shown to violate the Due Process Clause.. | 22 |
| A. The Due Process Clause does not require the government to demonstrate a "compelling necessity" to justify all "restrictions and privations" resulting from pretrial confinement | 27 |
| B. The courts below erred in concluding, on a motion for summary judgment, that double-celling of pretrial detainees at the MCC violates the Due Process Clause | 49 |
| II. Regulations that are reasonably related to the governmental interest in maintaining jail security and order must be upheld | 55 |

Argument—Continued


| | Page |
|---|---|
| A. The rule forbidding receipt of packages from outside the jail was shown to be a reasonable response to valid security concerns | 61 |
| B. The Bureau of Prisons regulation that restricts the receipt by inmates of hardback books to those mailed directly from publishers is a reasonable response to security and administrative requirements | 65 |
| C. The visual body cavity inspection conducted after contact visits is a reasonable security requirement | 70 |
| D. The practice of excluding pretrial detainees from their residential rooms during routine room inspections is justified by the need to avoid disruption of an important security procedure | 77 |
| Conclusion | 80 |


## CITATIONS

Cases:


| | |
|---|---|
| *Adamson* v. *California*, 332 U.S. 46 | 28, 29 |
| *Ambrose* v. *Malcolm*, 414 F.Supp. 485 | 14 |
| *Aptheker* v. *Secretary of State*, 378 U.S. 500 | 31 |
| *Bates* v. *City of Little Rock*, 361 U.S. 516 | 30 |
| *Bell* v. *Manson*, 427 F.Supp. 450 | 72, 73 |
| *Bijeol* v. *Benson*, 404 F.Supp. 595 | 73 |
| *Bijeol* v. *Nelson*, 579 F.2d 423 | 39 |
| *Bonner* v. *Coughlin*, 517 F.2d 1311 | 71 |




Cases—Continued


| | |
|---|---|
| *Brandenburg* v. *Ohio*, 395 U.S. 444 | 31 |
| *Campbell* v. *McGruder*, 580 F.2d 521 | *passim* |
| *Chambers* v. *Maroney*, 399 U.S. 42 | 74, 76 |
| *Dandridge* v. *Williams*, 397 U.S. 471 | 32, 41 |
| *Daughtery* v. *Harris*, 476 F.2d 292, cert. denied, 414 U.S. 872 | 73 |
| *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 | 28 |
| *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392 | 9, 13, 37, 52, 53 |
| *Dombrowski* v. *Pfister*, 380 U.S. 479 | 69 |
| *Dunn* v. *Blumstein*, 405 U.S. 330 | 31 |
| *Duran* v. *Elrod*, 542 F.2d 998 | 24, 42, 43 |
| *Estelle* v. *Gamble*, 429 U.S. 97 | 22 |
| *Feeley* v. *Sampson*, 570 F.2d 364 | *passim* |
| *Ferguson* v. *Skrupa*, 372 U.S. 726 | 28 |
| *Frontiero* v. *Richardson*, 411 U.S. 677 | 42 |
| *Gerstein* v. *Pugh*, 420 U.S. 103 | 36 |
| *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836 | 73 |
| *Griswold* v. *Connecticut*, 381 U.S. 479 | 31, 33, 47 |
| *Guajardo* v. *Estelle*, 432 F.Supp. 1373 | 63, 64 |
| *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 | 24, 38 |
| *Healy* v. *James*, 408 U.S. 169 | 57 |
| *Hodges* v. *Klein*, 412 F.Supp. 896 | 73 |
| *Hutto* v. *Finney*, No. 76-1660 (June 23, 1978) | 22 |
| *Ingraham* v. *Wright*, 430 U.S. 651 | 23, 29, 41 |
| *Jackson* v. *Indiana*, 406 U.S. 715 | 43 |
| *Jacobson* v. *Massachusetts*, 197 U.S. 11 | 30 |
| *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 | *passim* |
| *Kelley* v. *Johnson*, 425 U.S. 238 | 29-30 |

Cases—Continued


| | Page |
|---|---|
| *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 | 39 |
| *Kunz* v. *New York*, 340 U.S. 290 | 69 |
| *Kusper* v. *Pantikes*, 414 U.S. 51 | 30 |
| *Lakeside* v. *Oregon*, No. 76-6942 | |
| *Lanza* v. *New York*, 370 U.S. 139 | 47, 71, 78 |
| *Lindsey* v. *Normet*, 405 U.S. 56 | 32, 41 |
| *Loe* v. *Armistead*, No. 77-2039 (4th Cir. Aug. 16, 1978) | 24 |
| *Main Road* v. *Aytch*, 565 F.2d 54 | 42, 44, 59, 60 |
| *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 | 32 |
| *McDonald* v. *Board of Election*, 394 U.S. 802 | 38 |
| *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245 | 43 |
| *Meachum* v. *Fano*, 427 U.S. 215 | 22, 23 |
| *Meyer* v. *Nebraska*, 262 U.S. 390 | 29, 30, 31, 33 |
| *Milliken* v. *Bradley*, 433 U.S. 267 | 42 |
| *Moore* v. *City of East Cleveland*, 431 U.S. 494 | *passim* |
| *NAACP* v. *Button*, 371 U.S. 415 | 69-70 |
| *Nebbia* v. *New York*, 291 U.S. 502 | 30 |
| *Newman* v. *State of Alabama*, 559 F.2d 283 | 12 |
| *Olsen v. Nebraska ex rel. Western Reference & Bond Association*, 313 U.S. 236 | 30 |
| *Padgett* v. *Stein*, 406 F.Supp. 287 | 42 |
| *Palko* v. *Connecticut*, 302 U.S. 319 | 29 |
| *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 | 47 |
| *Patterson* v. *Morrisette*, 564 F.2d 1109 | 43 |
| *Paul* v. *Davis*, 424 U.S. 693 | 29, 47, 48 |
| *Pell* v. *Procunier*, 417 U.S. 817 | *passim* |




Cases—Continued


| | Page |
|---|---|
| *Penn El* v. *Riddle*, 399 F.Supp 1059 | 73, 74 |
| *Poe* v. *Ullman*, 367 U.S. 497 | 29, 35 |
| *Procunier* v. *Martinez*, 416 U.S. 396 | 56, 57 |
| *Roe* v. *Wade*, 410 U.S. 113 | 31, 33, 47 |
| *Rhem* v. *Malcolm*, 507 F.2d 333 | 13, 26 |
| *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 | 32 |
| *Shapiro* v. *Thompson*, 394 U.S. 618 | 31, 37 |
| *Shelton* v. *Tucker*, 364 U.S. 479 | 31, 37 |
| *Smith* v. *California*, 361 U.S. 147 | 69 |
| *Stack* v. *Boyle*, 342 U.S. 1 | 36, 38-39 |
| *Stanley* v. *Georgia*, 394 U.S. 557 | 31 |
| *Stanley* v. *Illinois*, 405 U.S. 645 | 33 |
| *Tate* v. *Short*, 401 U.S. 395 | 37 |
| *Taylor* v. *Kentucky*, No. 77-5549 (May 30, 1978) | 37 |
| *Thornhill* v. *Alabama*, 310 U.S. 88 | 69 |
| *Tinker* v. *Des Moines School District*, 393 U.S. 503 | 57 |
| *United States* v. *Brignoni-Ponce*, 422 U.S. 873 | 74 |
| *United States* v. *Dawson*, 516 F.2d 796 | 47 |
| *United States* v. *Hearst*, 563 F.2d 1331, cert. denied, 435 U.S. 1000 | 47, 60, 79 |
| *United States* v. *Hitchcock*, 467 F.2d 1107, cert. denied, 410 U.S. 916 | 78 |
| *United States* v. *Lovett*, 328 U.S. 303 | 23 |
| *United States* v. *Martinez-Fuerte*, 428 U.S. 543 | 73-74 |
| *United States* v. *Mauro*, No. 76-1596 (May 23, 1978) | 5 |
| *United States* v. *Park*, 521 F.2d 1381 | 71 |
| *United States* v. *Savage*, 482 F.2d 1371, cert. denied, 415 U.S. 932 | 71 |

Cases—Continued


| | Page |
|---|---|
| *United States* v. *Strumes*, 549 F.2d 831 | 47 |
| *United States ex rel. Tyrrell* v. *Speaker*, 535 F.2d 823 | 43 |
| *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 | 34 |
| *Whalen* v. *Roe*, 429 U.S. 589 | 30, 47, 48 |
| *Whitney* v. *California*, 274 U.S. 357 | 28 |
| *Woods* v. *Daggett*, 541 F.2d 237 | 66 |


Constitution and statutes:


| | |
|---|---|
| United States Constitution: | |
| First Amendment | *passim* |
| Fourth Amendment | 3, 11, 47, 57, 70, 74 |
| Fifth Amendment | *passim* |
| Sixth Amendment | 15 |
| Eighth Amendment | *passim* |
| Fourteenth Amendment | 29 |
| Administrative Procedure Act, 5 U.S.C. 701(a)(2) | 13 |
| Bail Reform Act of 1966, 18 U.S.C. 3041 *et seq.*: | |
| 18 U.S.C. 3041 | 3 |
| 18 U.S.C. 3146 | 36, 59 |
| 18 U.S.C. 3148 | 36 |
| 18 U.S.C. 4042 | 4, 11, 13 |
| 18 U.S.C. 4081 | 11, 13 |


Miscellaneous:


| | |
|---|---|
| W. Blackstone, *Commentaries* (1977) | 36 |
| 43 Fed. Reg. 30576 (July 17, 1978) | 66 |




Miscellaneous—Continued


| | Page |
|---|---|
| Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) | 35 |
| *Note, Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. Rev. 462 (1977) | 38 |

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

No. 77-1829

GRIFFIN B. BELL, ET AL., PETITIONERS

*v.*

LOUIS WOLFISH, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE PETITIONERS

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-37a) is reported at 573 F.2d 118. The opinions of the district court (Pet. Apps. F and G, 74a-225a) are reported at 439 F. Supp. 114 and 428 F. Supp. 333.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B, 38a-39a) was entered on January 24, 1978. On

April 14, 1978, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 24, 1978. On May 15, 1978, Mr. Justice Marshall further extended the time for filing a petition for a writ of certiorari to and including June 23, 1978. The petition was filed on that date and was granted on October 2, 1978 (A. 97). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that the validity of double-celling of pretrial detainees be judged by a standard of "compelling necessity" and without consideration of the administrative and financial circumstances that have led to adoption of the challenged practice.

2. Whether the governmental interest in maintaining jail security and order justifies rules that (a) prohibit receipt at the jail of packages containing items of food or personal property; (b) prohibit receipt at the jail of hardbacked books that are not mailed directly from publishers or bookstores; (c) require inmates to expose body cavities for visual inspection as part of the search conducted after contact visits with persons from outside the detention center; and (d) authorize the exclusion of pretrial detainees from their rooms during routine inspections.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. 3041 provides in part:

> For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of the common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense

of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * *

18 U.S.C. 4042 provides in part:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction and discipline of all persons charged with or convicted of offenses against the United States * * *.

## STATEMENT

1. The federal Metropolitan Correctional Center (MCC) is located in New York City adjacent to the Foley Square courthouse. The primary objective of the MCC is to house persons who are being detained in custody prior to trial for federal criminal offenses in the Southern and Eastern Districts of New York and the District of New Jersey. In addition, the MCC houses some convicted inmates who are awaiting sentencing or transportation to federal



prison or who are serving their sentences in a service capacity at the MCC (Pet. App. 4a-5a, 200a-202a).[1]

The MCC was constructed in 1975 to replace the aging federal West Street facility, which had been in use in New York City since 1928. At the time the MCC was designed, it was intended to incorporate the most advanced and innovative features of modern correctional design. As the court of appeals stated, "it represented the architectural embodiment of the best and most progressive penological planning" (Pet. App. 4a). The key design element of the facility is the modular or unit concept, in which a number of self-contained residential units replace the traditional cellblock jail construction. The typical unit consists of approximately 48 private rooms (or six larger dormitory rooms) adjoining or opening onto common multi-purpose rooms to which the detainees have free daytime access.[2] The common areas include facilities for food preparation and dining, recreation, and education. Each of the units also has an adjacent area for receiving visitors. By eliminating any need for frequent, scheduled move-

---

[1] Many of the convicted inmates at the MCC are prisoners who have been lodged at the facility under writs of habeas corpus *ad prosequendum* or *ad testificandum* issued to secure their presence at forthcoming trials. To the extent these include state prisoners against whom federal detainers have been lodged, they cannot be returned to state custody because of the Interstate Agreement on Detainers. See *United States* v. *Mauro*, No. 76-1596 (May 23, 1978).

[2] The period of free access varies from 15 to 17 hours per day (Pet. App. 4a).

ments of detainees into different functional areas of the facility, it was expected that the modular design would "humanize staff-inmate relations and provide a more 'homelike' atmosphere, affording inmates greater privacy and freedom than jails of earlier construction" (Pet. App. 4a-5a).[3]

2. Initial plans for the MCC provided for a capacity of approximately 400 inmates, or an increase of one-third over the West Street facility (A. 89-91).[4] These plans were later revised and expanded so that at the time the MCC opened the planned capacity was 449 inmates, or approximately 50 percent greater than at the old jail (Pet. App. 6a, 115a).

During the period that the MCC was under planning and construction, the number of persons committed to pretrial custody began to rise at an unprecedented rate (*ibid.*). When the MCC was opened, the Bureau of Prisons employed several measures in an effort to manage the unexpected flow of persons committed to that facility. The Bureau located persons awaiting deportation proceedings at other federal facilities and eliminated the planned community treatment center, or "half-way house," at the MCC

[3] As the court of appeals noted, the residential atmosphere of the facility is enhanced by carpeting and by clear exterior windows without bars (Pet. App. 5a).

[4] The population at the West Street facility had been 285-300 inmates (J.A. 2122, 2375). "J.A." refers to the Joint Appendix in the court of appeals.



(J.A. 1657).[5] The Bureau also arranged to expedite the transfer of inmates to prisons upon sentencing and contracted with private half-way houses for additional bedspace (A. 22, 64-65).

Despite these efforts, however, the inmate population at the MCC began to rise above its planned capacity within a short time after its opening. In November 1975, in order to provide sleeping space for this increased number of inmates, the MCC began to replace single beds with bunk beds in some of the residential rooms used to house pretrial detainees (A. 21).[6] Similarly, the Bureau installed bunk beds in the dormitory rooms in order to double the capacity of those areas (J.A. 1184-1185). During brief periods of unusual influx of persons into the facility, a small number of detainees and inmates were provided with temporary sleeping space in the common areas of the modular units (A. 23). These persons were transferred to residential rooms as soon as space became available (*ibid.*).

3. On November 28, 1975—less than four months after the MCC was opened—Louis Wolfish, then a pretrial detainee at the facility, initiated this action

[5] These changes freed 108 spaces for the housing of pretrial detainees and convicted inmates at the MCC (J.A. 1266-1267, 2501-2502, 2521-2522).

[6] The district court noted that 121 of the 389 residential rooms had been "designated" for double-occupancy as of the time of its decision (Pet. App. 203a). The number of rooms actually housing two inmates, however, did not exceed 73, and, of these, only 35 were rooms in units designated to house pretrial detainees (A. 33-34; J.A. 82).

by filing a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of New York. The petition alleged that overcrowding and other improper conditions at the MCC made confinement at that facility unconstitutional.[7] The district court certified the case as a class action on behalf of all persons confined at the MCC (Pet. App. 7a); the litigation has thus simultaneously implicated the rights of both pretrial detainees and sentenced inmates with regard to their conditions of confinement.

In its two opinions and several orders in this case, the district court declared unlawful and enjoined numerous separate aspects of the MCC administration. In evaluating the lawfulness of conditions of confinement for pretrial detainees under the Due Process Clause, the court stated that, since detainees are "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of * * * rights beyond those which are necessary for confinement alone, must be justified by a com-

[7] The petition, as amended, alleged a multitude of constitutional violations at the MCC. These included, *inter alia*, overcrowding; undue length of confinement; improper monitoring of personal mail; improper strip searches after contact visits; inadequate visiting hours; inadequate access to legal materials; inadequate recreational, educational and employment opportunities; inadequate telephone service; restrictions on religious freedoms; restrictions on the purchase and receipt of items of personal property; inadequate and unsanitary food; objectionable uniforms; poor ventilation; insufficient staff; unannounced transfers; and inadequate services for non-English-speaking inmates (Pet. App. 7a-8a and n. 7).



pelling necessity.'" (Pet. App. 89a, quoting *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975)). While the court noted that the rights of convicted inmates must be measured under the different standard of the Eighth Amendment, the court concluded that convicted inmates at the MCC must be treated equally with detainees in terms of essential living conditions because it would be "cruel and unusual" to treat them as an "inferior minority" at the MCC (Pet. App. 213a).

Applying these legal standards, the court granted the inmates' motion for partial summary judgment and enjoined the practice of double-bunking pretrial detainees or convicted inmates in a single residential room at the MCC (Pet. App. 207a-213a). The court relied largely on its visual inspection of the facility and on evidence presented in other cases (*id.* at 205a and n.5, 207a-211a) to reject the government's claim that triable issues of fact exist and that double-bunking provides adequate and reasonable housing at the MCC. The court noted that there is "a good deal of contrary expert opinion about the physical and psychological effects of confining two prisoners in one room or cell" (*id.* at 210a).[8] The court con-

[8] The government presented the affidavit of Dr. Walter Menninger, who stated that "'double-bunking' as practiced at the MCC should not have any significant detrimental effects on the physical or psychological health of the inmates at that institution" (A. 31-32). The respondents presented no evidence on this issue in their motion for summary judgment. The court's reference to conflicting psychiatric testimony was to evidence presented in a different lawsuit involving a different pretrial detention facility (Pet. App. 208a-210a).

cluded, however, that it was not required "to litigate over and over again general propositions about matters of human experience" (*id.* at 211a). The court stated that other litigation had established that double-bunking in a single cell causes "fundamental denials of decency, privacy, personal security, and, simply, civilized humanity" (*id.* at 211a). Although the court acknowledged that there were substantial factual distinctions betwen the conditions at the MCC and at the facilities involved in the prior cases, the court found nothing at the MCC to justify a departure from the earlier decisions (*id.* at 208a, 211a).

Following a month-long trial on remaining issues, the court held unlawful and enjoined the doubling of sleeping quarters in the dormitory areas and the use of common recreational areas to provide temporary sleeping facilities when all other quarters were occupied (Pet. App. 121a-126a). The court concluded that the crowding resulting from these practices abridged the inmates' rights to privacy and decent accommodations, was not justified by any sufficient governmental interest, and was therefore unconstitutional (Pet. App. 116a-121a).

In addition to the holdings based on the Due Process Clause and the Eighth Amendment, the court found that other practices at the MCC violated specific constitutional guarantees applicable to both pretrial detainees and convicted inmates. The court held that the First Amendment rights of all persons confined at the MCC were violated by the Bureau of



Prisons' "publisher only" rule, which at the time prohibited the receipt of all books and magazines mailed from outside the facility except those mailed directly from publishers or book clubs. The court refused to accept the security justifications advanced in support of this practice (Pet. App. 215a-216a). The court also held that the requirements that (i) detainees remain outside their rooms during routine inspections,[9] and (ii) detainees and convicted inmates expose their body cavities for a visual inspection as part of a routine search conducted following contact visits, were not justified by a sufficient governmental interest in security or prison administration. The court held that the former of these two practices violated the retained right of privacy of pretrial detainees, and the latter constituted an unreasonable search in violation of the Fourth Amendment (Pet. App. 147a-157a). Finally, with regard to the issues that are presented for decision by this Court, the district court invalidated the prohibition against receipt of packages containing food and items of personal property by inmates (*id.* at 162a-166a).[10]

---

[9] The court did not strike the MCC rule requiring convicted inmates to vacate their rooms during routine inspections (Pet. App. 157a). The court stated that although the justification for the practice was not "compelling," it was sufficient to make the search procedure reasonable and therefore sustainable in the case of convicted inmates (*ibid.*).

[10] The court apparently based this ruling on the fact that the Bureau of Prisons' enabling legislation creates duties to "care" for prisoners and to provide prisoners with "suitable quarters," 18 U.S.C. 4042, 4081, and that these duties are

4. On appeal, the Second Circuit largely affirmed the district court's holdings under the Due Process Clause, while rejecting the district court's reliance on the Eighth Amendment. The court of appeals stated that, under the Eighth Amendment

> [a]n institution's obligation * * * is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety.

Pet. App. 13a, citing *Newman* v. *State of Alabama*, 559 F.2d 283, 291 (5th Cir. 1977). The court of appeals rejected the district court's reasoning that it is cruel and unusual to house prisoners in conditions worse than detainees are housed in the same facility, and remanded for the district court to determine whether the housing for convicted inmates at the

---

enforceable to prevent arbitrary and capricious maladministration (Pet. App. 83a-84a). Following the trial, the court relied on this legislation and on the Due Process Clause to hold unlawful and enjoin several other aspects of confinement at the MCC. For example, the court enjoined MCC regulations imposing limitations on visits from family, friends, attorneys, and co-defendants (Pet. App. 129a-140a); limitations on telephone service and commissary privileges (*id.* at 111a-115a, 140a-143a); limitations on the use of the visiting room bathroom (*id.* at 134a-135a); and requirements for the use of an inmate uniform (*id.* at 166a-169a). The court also affirmatively required the MCC to increase the materials available in a law library at the facility (*id.* at 102a-106a) and enjoined the MCC from retaining any detainee or inmate at the facility for a period in excess of 60 days without the inmate's written consent (*id.* at 96a-98a). The district court did not indicate in each case whether it was relying on a statutory or constitutional basis for its various holdings.



MCC was constitutionally "adequate" (Pet. App. 19a-20a).[11]

With regard to the scope of protection afforded pretrial detainees by the Due Process Clause, the court of appeals indicated that the district court had articulated the correct legal standard but had misapplied the standard in some situations. The court reiterated the Second Circuit's view that pretrial detainees may be subjected to "only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration'" (Pet. App. 12a, quoting *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974); *Detainees of the Brooklyn House of Detention* v. *Malcolm*, *supra*, 520 F.2d at 397). The court stated that neither fiscal necessity nor administrative convenience could justify restrictions on the rights of detainees (Pet. App. 12a). At the same time, however, the court stated that "the institution

---

[11] The court of appeals also held (Pet. App. 14a-15a) that the district court erred in relying on the Bureau of Prisons' enabling legislation to strike several specific administrative practices as arbitrary and capricious. See note 10, *supra*. The court of appeals noted that 18 U.S.C. 4042 and 4081 confer broad discretion on the Attorney General to safekeep and care for inmates. The court concluded that the administration of federal prisons constitutes "agency action * * * committed to agency discretion by law" and is therefore exempted from judicial review by the Administrative Procedure Act, 5 U.S.C. 701(a)(2) (Pet. App. 14a-15a). On this basis, the court of appeals reversed the district court's holdings that the bathroom in the visiting area must be kept unlocked and that prison authorities must make local and long-distance telephone service available to MCC inmates (Pet. App. 15a-17a).

must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" and that the courts should not "second-guess the expert administrators on matters on which they are better informed" (*id.* at 12a-13a).

On the issue of double-bunking of detainees, the court concluded that "the administrators of the MCC have made no showing of compelling necessity" to justify the invasion of personal privacy involved (*id.* at 17a), and it prohibited double-celling in rooms intended for one individual (*id.* at 18a-19a). Applying the same analysis, the court held that doubling the number of inmates housed in the dormitory areas was unjustified, but remanded for the district court to determine "whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories" (*id.* at 21a, 23a).[12]

The court of appeals agreed with the district court that several other aspects of confinement at MCC violated the First Amendment and Fourth Amendment

[12] The court recognized that convicted inmates, rather than detainees, are presently quartered in the dormitory areas. The court referred to a decision involving pretrial detainees, however, in directing the district court to redetermine the constitutional capacity of the dormitory areas (Pet. App. 22a, citing *Ambrose* v. *Malcolm*, 414 F. Supp. 485 (S.D. N.Y. 1976)).

The court also remanded to the district court for it to determine whether, in light of changed conditions resulting from this litigation, the nature of confinement at the MCC is now sufficiently tolerable that the order limiting incarceration of all detainees at the MCC to a period of less than 60 days should be rescinded (Pet. App. 24a-25a).



rights of both convicted inmates and pretrial detainees.[13] Specifically, the court rejected asserted security concerns and upheld the district court's order enjoining the "publisher only" rule that limited the receipt of books and magazines by inmates at the MCC (*id.* at 26a-29a). The court also held that there were no sufficient security or administrative justifications for the MCC policies (1) that prohibit the receipt of packages containing food and personal items by detainees and convicted inmates (*id.* at 32a-33a), (2) that require detainees and convicted inmates to expose their body cavities during routine searches conducted after contact visits (*id.* at 29a-30a), and (3) that prevent detainees from observing searches of their rooms (*id.* at 30a-32a), and it accordingly prohibited continuation of these practices.[14]

[13] Relying on the Sixth Amendment right to counsel and the due process right of prisoners to have access to the courts, the court of appeals affirmed the orders of the district court that require an expansion of the MCC library and maintenance of extended visiting hours for attorneys (Pet. App. 35a-36a).

[14] The court of appeals reversed the ruling of the district court that inmates must be permitted to possess typewriters for their personal use in their rooms. It stated that the district court had improperly rejected "the MCC's judgment that * * * particular problems of security, storage, and theft [would arise] from inmates' ownership of typewriters * * *" (*id.* at 33a). The court of appeals also reversed the district court's determination that inmates should not be required to wear uniforms, holding (*id.* at 34a) that

> the MCC has demonstrated a legitimate security interest in readily identifying inmates that outweighs the inmates' understandable desire to control their own appearance.

## SUMMARY OF ARGUMENT

### I

In evaluating the constitutionality of conditions of pretrial confinement, the court of appeals concluded that pretrial detainees retain the "rights afforded to unincarcerated individuals" (Pet. App. 11a) and that it is therefore not enough for conditions of confinement merely to "comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause * * *" (*ibid.*). The court held that the Due Process Clause requires that pretrial detainees be subjected to only those "restrictions and privations" that "inhere in their confinement itself or which are justified by compelling necessities of jail administration" (Pet. App. 12a). Applying this analysis to evaluate the permissibility of double-bunking detainees in the residential rooms at the MCC, the court refused to consider governmental fiscal and administrative requirements and concluded that the practice was unconstitutional because the government "made no showing of compelling necessity" to justify the infringement of privacy imposed by double celling (*id.* at 17a).

We submit that the court erred both in its analysis of the general requirements of due process and in its application of that analysis to evaluate the housing conditions afforded pretrial detainees at the MCC. We readily acknowledge that there are significant differences material to the present inquiry between the due process rights of convicted inmates and of pre-



trial detainees. Although the most fundamental liberty interest of the detainee—his right to move freely in society—has been extinguished by the proceedings leading to his commitment, he nevertheless retains significant liberty interests which those proceedings have not impaired. But even accepting the premise that the liberty interests retained by pretrial detainees are essentially equivalent to those of other citizens, this Court has never held that the government must justify every restriction and privation imposed on citizens by a compelling necessity. Under this Court's decisions, unless government action affects an aspect of fundamental liberty, the action need only be shown to be reasonable in light of the government's legitimate interests.

The initial decision to detain a person suspected of committing a crime involves, of course, a fundamental deprivation of liberty. But the government's right to impose this substantial deprivation is a necessary aspect of its responsibility to enforce the criminal law and is not challenged in this case. In evaluating the particular aspects of confinement once detention is ordered, it may be that some institutional restrictions implicate interests that this Court has recognized as fundamental liberties (*i.e.*, First Amendment freedoms) and that a compelling governmental justification would therefore be required to support the government's practice. Other restrictions of confinement, however, impinge only upon the inmates' understandable desire to live comfortably during detention (*i.e.*, possession of items of personal

property). While it may be assumed that the government may not impose arbitrary restrictions or purposeless restraints on such interests, the justification for governmental action affecting these interests need not be compelling.

In accomplishing the important governmental interest in producing the detainee for trial, the government must "make the everyday administrative decisions necessary to run" jails as places of pretrial confinement, adopt rules to "maintain the security of the jail, [and] generally [seek] to sustain the institution of pretrial detention at a feasible cost." *Campbell* v. *McGruder*, 580 F. 2d 521, 528, 531 (D.C. Cir. 1978). Where conditions of confinement not implicating fundamental constitutional guarantees are challenged under the Due Process Clause, it is the reasonableness of the practices that determines whether they should be sustained, and the reasonableness must be assessed in light of the valid governmental objectives they are designed to foster. There may be occasions where the practice impinges on particularly substantial liberty interests whose character is such that the courts should examine with particular care the governmental justifications to assure that they support the challenged restraint. The due process analysis of the court of appeals, however, improperly circumscribes the governmental interests that may justify practices and conditions of pretrial detention by broadly requiring a compelling justification for all restrictions and privations of confinement.



The difficulties inherent in the analysis of the court of appeals are reflected in its conclusion that double-celling in the residential rooms at the MCC violates due process because no "compelling necessity" was shown to support the practice. To be sure, as the court of appeals observed, double-celling affects the individual interest in privacy. The cases in this Court that have defined certain privacy interests as fundamental have never suggested, however, that the interest requires a literal, physical separation of individuals, especially in the context of institutional care or confinement. It may be that, under the analysis adopted by a plurality of this Court in *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977), the interest in privacy and human dignity implicated by housing pretrial detainees in relatively confined, non-private quarters is such that the courts should carefully examine the practice to ensure that it is fairly and substantially related to the government's valid interests. Even under this approach, however, pretrial housing conditions significantly affecting personal privacy should be upheld if, upon a careful examination, they are found to satisfy a minimum standard of decency and humane treatment and to be reasonable in light of the government's substantial administrative and fiscal concerns.

In this case, however, the court of appeals expressly refused to consider the administrative and fiscal interests of the government in upholding the determination, on a motion for summary judgment, that double-celling is unconstitutional. The record

before the district court on the summary judgment motion provided no basis for a conclusion that the practice of double-bunking as implemented at the MCC fails to afford minimally decent and humane conditions or is unreasonable in light of a careful examination of the government's legitimate interests. The court of appeals therefore should have vacated the entry of summary judgment and remanded for further proceedings in which the nature and justification for the practice in the particular context of the MCC would be considered.

## II

In its evaluation of institutional restrictions that are designed to promote security and order at the MCC, the court of appeals recognized that maintenance of security and order is a compelling or inherent necessity of jail administration and that an "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (Pet. App. 12a-13a). The court also noted that under this Court's decision in *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), the administrative determination as to the needs of institutional security and order is entitled to substantial deference and the courts should not "second-guess the expert administrators on matters on which they are better informed" (Pet. App. 13a). In reviewing several specific institutional security practices claimed to abridge the constitutional rights of both pretrial and convicted inmates at the



MCC, however, the court of appeals misapplied these principles in rejecting the determination of the correctional officials that the challenged practices serve the facility's substantial interest in security and order.

The government's correctional authorities and other correctional experts testified in the district court that the restriction on the receipt of packages from outside the facility, and on the receipt of books mailed from individuals other than publishers, were necessary to preserve order and to limit the introduction of contraband into the facility. Similarly, these correctional experts established the significant security concerns that support the need to perform a visual inspection of body cavities as part of the search conducted following contact visits and the need to exclude detainees from their rooms while routine room inspections are conducted. In each instance, however, the courts below rejected the evaluation of the correctional experts as to the security interests implicated by the institutional practices.

In doing so, the court failed to identify any substantial evidence suggesting that the government's security concerns were exaggerated or unreasonable. Nor did the court identify any alternative security procedures that would otherwise satisfy the government's reasonable concerns. The court's rejection of the government's security concerns simply represents its disagreement with the judgment of jail officials regarding the security problems that exist and the means required to control them. It is precisely this

type of unguided substitution of judicial for correctional judgment as to the needs of institutional security that this Court has held to be inappropriate.

## ARGUMENT

### I

### DOUBLE BUNKING OF PRETRIAL DETAINEES IN THE RESIDENTIAL ROOMS AT THE METROPOLITAN CORRECTIONAL CENTER HAS NOT BEEN SHOWN TO VIOLATE THE DUE PROCESS CLAUSE

In recent years, federal courts have become increasingly familiar with litigation brought by convicted inmates challenging various conditions of their confinement. *E.g.*, *Hutto* v. *Finney*, No. 76-1660 (June 23, 1978); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Meachum* v. *Fano*, 427 U.S. 215 (1976). In such cases, the courts have accorded "wide-ranging deference" to the determination of prison administrators to implement correctional policy and protect institutional security and order, *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 125, 128, while at the same time affording some protection for constitutional rights whose loss is not "implicit in incarceration." *Id.* at 125; *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

While certain express constitutional guarantees, such as the First Amendment right of free speech, have been held to remain applicable in the prison context, this Court has recognized that a convicted prisoner's generalized interest in liberty under the Due



Process Clause affords no independent substantive restraint on correctional confinement:

> [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.

*Meachum* v. *Fano*, *supra*, 427 U.S. at 224. Accordingly, the court of appeals was correct in stating in this case (Pet. App. 13a) that a convicted prisoner's challenge to conditions of confinement draws no independent force from the Due Process Clause and must instead be based on express constitutional restraints on government action, such as the Eighth Amendment's prohibition against cruel and unusual punishment.

The due process issues in this case, however, principally concern pretrial detainees rather than convicted inmates. Pretrial detainees, who have been ordered confined while awaiting trial and have not been convicted of any crime, retain a generalized interest in liberty under the Due Process Clause that has not been effectively extinguished by the order of confinement. At a minimum, due process of law would require that punishment not be inflicted, nor correction undertaken, prior to an adjudication of guilt. *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 n.40 (1977); *United States* v. *Lovett*, 328 U.S. 303, 317 (1946).

It is common ground among us, the respondents, and the court of appeals that the Eighth Amendment's prohibition against cruel and unusual punishment requires that convicts committed to the custody of the government and confined in custodial institutions must be afforded decent and humane living conditions with regard to such essentials as housing, food, clothing, and medical care. *Duran* v. *Elrod*, 542 F. 2d 998, 999-1000 (7th Cir. 1976). While the Eighth Amendment is not directly applicable to detainees, the minimum levels of decency required in connection with the confinement of convicts are, we agree, applicable to the conditions of confinement of pretrial detainees pursuant to the Due Process Clause. *Ibid.*; *Feeley* v. *Sampson*, 570 F. 2d 364, 370 (1st Cir. 1978). See also *Loe* v. *Armistead*, No. 77-2039 (4th Cir. Aug. 16, 1978), slip op. 9; *Hampton* v. *Holmesburg Prison Officials*, 546 F. 2d 1077, 1079-1080 (3d Cir. 1976).[15] We also do not contest the proposition that conditions of housing, food, and medical care that fail to satisfy these basic standards of decency may

[15] We note in this connection, however, that the content of the minimum required conditions may vary to some extent on the basis of the nature and purpose of the confinement. It is arguable, for instance, that individuals committed to the custody of the government in civil commitment proceedings must be supplied higher levels of medical care than the minima that would be satisfactory in the case of pretrial detainees or convicts. And in distinguishing between the minimum conditions that may be permissible in various contexts, duration of confinement is surely an important factor; conditions that may not be physically or psychologically injurious to persons detained for a relatively brief period might prove unacceptable for longer term confinement.



not be defended by reference to considerations of administrative convenience or limited financial resources.[16]

It is our position, elaborated more fully below (see pages 50-53, *infra*), that the record in this case provides no support for a conclusion that the housing conditions for pretrial detainees at the MCC fall below the minimum levels of decency generally applicable to persons committed to government custody. The more substantial questions presented in this case concern the extent to which pretrial detainees retain constitutional liberty interests that entitle them to better conditions of confinement than are required for convicted inmates and the difference, if any, in the standards by which courts should assess claimed infringements of such liberty interests in the context of confinement of persons not convicted of crime.

The court of appeals, invoking the presumption of innocence, held in this case that pretrial detainees retain "the rights afforded unincarcerated individuals" (Pet. App. 11a), and that therefore "it is not enough that [their] conditions of incarceration * * * merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause * * *" (*ibid.*). Rather, the court stated that the Due Process Clause requires that pretrial detainees be subjected to only those "restrictions and

[16] While administrative and fiscal considerations may not justify such conditions, they would, in our view, remain relevant to the problem of shaping an appropriate remedy to eliminate objectionable conditions.

privations" that "inhere in their confinement itself or which are justified by compelling necessities of jail administration" (Pet. App. 12a, quoting *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)). It asserted that, in evaluating the conditions of pretrial confinement, "cries of fiscal necessity * * * [and] administrative convenience" cannot justify institutional privations or restrictions (Pet. App. 12a). Applying this analysis to the practice of double bunking detainees in the residential rooms at the MCC, the court stated that "the administrators of the MCC have made no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling" and thus concluded that the practice was unconstitutional (*id.* at 17a).

We submit that the court erred both in its analysis of the general requirements of due process and in its application of that analysis to evaluate the housing conditions afforded pretrial detainees at the MCC. We argue below that the court's error stems from the application of an incorrect standard for evaluation of the pretrial detainees' challenge to the conditions of pretrial confinement at the MCC and from the court's failure to recognize the legitimate governmental administrative and fiscal concerns that bear on the propriety of the institutional practice. We then argue that the court erred in upholding the grant of summary judgment on this issue, thereby precluding the development of facts material to a



proper analysis of the sufficiency of the housing conditions at the MCC.

### A. The Due Process Clause Does Not Require The Government To Demonstrate A "Compelling Necessity" To Justify All "Restrictions and Privations" Resulting From Pretrial Confinement

The premise underlying the due process analysis of the court of appeals is that, since a pretrial detainee must be presumed to be innocent, he is entitled to "the rights afforded unincarcerated individuals" (Pet. App. 11a). Reasoning from this premise, the court concluded that pretrial detainees may not be subjected to any "restrictions and privations" during pretrial confinement except those that inhere in the nature of confinement or that are justified by "compelling" governmental necessities (*id.* at 12a).

Even accepting the premise that the liberty interests retained by pretrial detainees are essentially equivalent to those of other citizens, the court's conclusion does not follow. This Court has never held that the government must justify every "restriction or privation" that it imposes on citizens by a "compelling necessity." The analysis employed by the Court under the Due Process Clause has been more complex. And while there may be room for debate in the present context about the extent to which the courts may properly scrutinize the reasonableness of various conditions of confinement unrelated to recognized fundamental interests, there is no basis for the court of appeals' conclusion that these conditions, or any particular aspect of them, must be justified by

compelling governmental necessity to pass constitutional muster.

1. In determining the extent to which individual liberties are afforded substantive protection from government regulation, the Court has been careful to avoid assuming the role of a " 'superlegislature to weigh the wisdom of legislation.' " *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963), quoting *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). A cautious sensitivity to the very legitimacy of any application of the Due Process Clause to impose substantive, as contrasted with procedural, restrictions on government action frames the backdrop to the Court's "substantive due process" decisions. See, *e.g.*, *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 537-538 (Stewart, J., dissenting); *id.* at 542-544 (White, J., dissenting).[17]

Thus, while the Court has articulated a broad range of interests that come within the concept of

---

[17] Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation * * *.

*Moore* v. *City of East Cleveland*, 431 U.S. 494, 543 (White, J., dissenting). See also *Adamson* v. *California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).



"liberty" [18] and has stated that these aspects of liberty may not be subjected to "arbitrary [restraints that are] without reasonable relation to some purpose within the competency of the State to effect," *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923); see *Kelley* v.

---

[18] An initial inquiry in every case involving a claim to due process protection is whether an interest in "life, liberty, or property" has been affected by the challenged governmental action. U.S. Const. Amend. V; *Ingraham* v. *Wright*, *supra*, 430 U.S. at 672; *Paul* v. *Davis*, 424 U.S. 693, 711-712 (1976). The Court's decisions initially suggested an expansive content to the concept of liberty protected under the Due Process Clause:

> [Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). In the process of determining the extent to which the Due Process Clause of the Fourteenth Amendment incorporated the restrictions of the Bill of Rights to state action, the Court's decisions suggested that only liberties that are fundamental or " 'implicit in the concept of ordered liberty' " became secure from state interference. See *Adamson* v. *California*, 332 U.S. 46, 54 (1947), quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Nonetheless, the court has recently approved the analysis of Justice Harlan, dissenting in *Poe* v. *Ullman*, 367 U.S. 497, 542-543 (1961), that "liberty" "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints * * *." See *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977); *id.* at 545 (White, J., dissenting). See also *Ingraham* v. *Wright*, *supra*, 430 U.S. at 673, quoting with approval *Meyer* v. *Nebraska*, *supra*, 262 U.S. at 399.

*Johnson*, 425 U.S. 238, 247 (1976); *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30-31, 35-37 (1905), the Court has recognized that it is ordinarily inappropriate for the judiciary to substitute its evaluation of the need for and utility of legislation or administrative regulation for the determination made by the politically responsible branches of government. *E.g.*, *Whalen* v. *Roe*, 429 U.S. 589, 597 (1977); *Olsen* v. *Nebraska ex rel. Western Reference & Bond Association*, 313 U.S. 236, 246 (1941). Thus, it has been stated that the "liberty" ordinarily protected from governmental intrusion by the Due Process Clause is not freedom from all forms of government restriction, but instead freedom from arbitrary and purposeless government action. *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion); *id.* at 547 (White, J., dissenting). See also *Meyer* v. *Nebraska*, *supra*, 262 U.S. at 400.

At the same time, however, where the legitimacy of the courts' substantive function under the Due Process Clause has been anchored in a textual limitation on the powers of government established by other specific provisions of the Constitution, such as the right of free speech or the right of assembly, the Court has required more than "a mere showing of a legitimate state interest" to justify legislation "that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973); *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960). Government action interfering with such fundamental constitutional liberties must be supported by a "compelling" justification of governmental necessity. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 155 (1973); *Stanley* v. *Georgia*, 394 U.S. 557, 563-564 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479, 481-486 (1965). This heightened judicial protection against governmental interference with liberties that are explicitly guaranteed by the Constitution has also been thought applicable under the Due Process Clause to those "peripheral rights" that are necessary to "mak[e] the express guarantees fully meaningful." *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965). On this basis, it has been held that the liberty interests that are "fundamental" and entitled to searching judicial scrutiny include not only the right of association, *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960), the right to free speech, *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969), the right to vote, *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972), and the right to interstate travel, *Shapiro* v. *Thompson*, 394 U.S. 618, 629-630 (1969); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505 (1964), but also a freedom of personal choice in matters of marriage and family life that is inherent within the several limitations on governmental authority over private conduct established by the Bill of Rights. *Griswold* v. *Connecticut*, 381 U.S. 479, 485-486 (1965) (marital relationship). See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 152-153 (1973) (abortion); *Meyer* v. *Nebraska*, *supra* (child rearing and education).

While an interest need not be specifically guaranteed by the Constitution in order to come within the sphere of "liberty" protected by the Due Process Clause (see note 18, *supra*), those aspects of personal freedom that are considered so fundamental as to justify strict judicial scrutiny are nevertheless sharply limited. The Court has held that even important personal interests that are basic to economic and social life fall outside the area of special judicial competence and protection where the right is not "explicitly or implicitly guaranteed by the Constitution." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33 (1973) (education). See also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976) (employment); *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (decent housing); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (welfare benefits).

We are aware of only one context in which the Court has recognized a category of personal interests that, although not "fundamental" within the meaning described above, are nonetheless afforded enhanced judicial protection under the Due Process Clause. In *Moore* v. *City of East Cleveland*, *supra*, the Court held invalid under the Due Process Clause a single-family zoning ordinance that narrowly defined the types of relatives that may live together as a "family" and thus materially interfered with "the choice of [relatives] * * * to live together." 431 U.S. at 512.[19]

[19] Justice Stevens concurred on the separate basis that the zoning ordinance was an arbitrary interference with the homeowner's right "to use her own property as she sees fit." 431 U.S. at 513, 514. Chief Justice Burger and Justices Stewart, White and Rehnquist dissented.



Justice Powell noted in the plurality opinion that although the interest that relatives possess in living together is technically different from a parent's "freedom of choice with respect to childbearing," [20] or "the rights of parents to the custody and companionship of their own children," [21] or the "traditional parental authority in matters of child rearing and education," [22] *id.* at 500-501,[23] nonetheless the freedom of relatives to live together is an interest that is "deeply rooted in this Nation's history and tradition," *id.* at 503, and "may not lightly be denied by the State." *Id.* at 506. Although a "compelling" justification for the state interference with this protected liberty interest was not required,[24] Justice Powell con-

[20] See *Roe* v. *Wade*, *supra*; *Griswold* v. *Connecticut*, *supra*.

[21] See *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972).

[22] See *Meyer* v. *Nebraska*, *supra*.

[23] As Justice Stewart observed in his dissent, *id.* at 534-538, the prior cases protecting family relations were premised on the belief that the associational interests at issue in these cases contributed to the enhancement of "substantively protected constitutional right[s]," *id.* at 538 (*i.e.*, First Amendment freedoms), or were " 'implicit in the concept of ordered liberty,' " *id.* at 537. See also *id.* at 549-550 (White, J., dissenting).

[24] By contrast, a "compelling" or "powerful countervailing interest" was required by the Court to justify governmental intrusion in marital or family privacy in the cases referred to by Justice Powell. *E.g.*, *Roe* v. *Wade*, *supra*, 410 U.S. at 155; *Stanley* v. *Illinois*, *supra*, 405 U.S. at 651. See also *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 485.

cluded that the Court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499. Justice Powell analyzed the State's "legitimate goals" in single-family zoning and concluded that they were only "marginally" enhanced by the narrow definition of "family" in the ordinance. *Id.* at 500. While this evidence of governmental justification would ordinarily be sufficient to uphold government action affecting non-fundamental personal interests, see *id.* at 538 (Stewart, J., dissenting); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974), it was not adequate to withstand the heightened scrutiny invoked by the plurality in *Moore*.

The decision in *Moore* thus reflects some movement away from the two-tier classification of liberty between "fundamental" and "non-fundamental" interests, and suggests that a middle range of interests that are "deeply rooted in this Nation's history and tradition" may be entitled to enhanced, though not strict, judicial supervision. Even if the Court were to adopt such a mid-level scrutiny in particular contexts, it would nonetheless remain the rule that the government must demonstrate a "compelling" justification for its action only when a "fundamental" personal liberty has been infringed. Where "deeply rooted" personal interests that are less than "fundamental" are subjected to governmental regulation, the analysis in *Moore* suggests that a "particularly



careful scrutiny of the state needs asserted to justify their abridgement" may be called for;[25] it remains clear, however, that a compelling government objective is not required. 431 U.S. at 502, quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

Accordingly, the conclusion of the court of appeals that every "restriction and privation" of pretrial confinement can be justified only by a compelling governmental necessity would be proper only if each "restriction and privation" imposed on pretrial detainees implicates a fundamental interest protected by the Constitution. For the reasons set forth below, this broad proposition cannot be sustained, nor, indeed, can it be shown that the particular privations involved in double-bunking invade such interests.

2. The initial decision to detain a person suspected of committing a crime involves, of course, a fundamental deprivation of personal liberty. But the government's right to impose this substantial deprivation is not challenged. While other means of assuring an accused's presence at trial are preferred under both

---

[25] Professor Gunther has suggested that such an enhanced evaluation of the extent to which a legislative classification advances a legitimate governmental objective "in actuality, not merely in conjecture," may be appropriate under the Equal Protection Clause. Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 21 (1972).

constitutional and statutory provisions,[26] the legitimacy of pretrial detention has always been recognized as a necessary aspect of the government's responsibility to enforce the criminal law.[27] "'[T]he State's duty to control crime,'" *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975), "justifies in the first instance the institution of pretrial detention." *Campbell* v. *McGruder*, 580 F.2d 521, 528 (D.C. Cir. 1978). Moreover, the accused receives the procedural protection of a judicial hearing and a determination of probable cause prior to commitment. *Gerstein* v. *Pugh*, *supra*.

The court of appeals did not dispute that the government permissibly may deprive a suspected criminal of his essential freedom to move at will in society pending his trial on the criminal charges. Nor did the court dispute that confining the individual in an institutional pretrial facility was an appropriate means of achieving the governmental objective. The court reasoned, however, that since a person committed to pretrial detention is presumed to be innocent, he retains the same liberties possessed by "unincarcerated individuals," subject only to such

[26] The Eighth Amendment prohibits excessive bail and federal statutes guarantee a right to the establishment of bail in non-capital cases. See *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951). The Bail Reform Act of 1966 established a liberal policy favoring pretrial release whenever conditions imposed upon release, including a bail bond, will "reasonably assure the appearance of the person as required." 18 U.S.C. 3146. See 18 U.S.C. 3148.

[27] See *Gerstein* v. *Pugh*, 420 U.S. 103, 114-116 (1975); 4 W. Blackstone, *Commentaries* 300.



restrictions as "inhere in confinement" or are justified by compelling governmental necessities. While the court emphasized that "[t]his standard of compelling necessity is neither rhetoric nor dicta" (Pet. App. 12a), the court provided scant guidance concerning the nature of the detainees' retained liberty interest that would invoke such an exacting scrutiny of the conditions of pretrial confinement.[28]

In large part, the court appears to rely on the "presumption of innocence" as a fundamental right that must be guarded from improper governmental intrusion. Reliance on the presumption of innocence does not, however, support the court's broad holding. The presumption of innocence is a procedural rule that allocates the burden of proof in criminal trials and, as such, is an aspect of the accused's right to a fair trial. *Taylor* v. *Kentucky*, No. 77-5549 (May 30, 1978), slip op. 5-12. Without denigrating the significance of the retained liberty interests of individuals in pretrial detention, we must agree with the observation of the Third Circuit that the pro-

[28] The authority from which the Second Circuit has derived its broad "compelling necessity" test is tangential at best. In *Detainees of the Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975), the court found authority for its test in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right of interstate travel), *Tate* v. *Short*, 401 U.S. 395 (1971) (equal protection violated by additional imprisonment based on inability to pay a fine), and *Shelton* v. *Tucker*, 364 U.S. 479 (1960) (teacher's First Amendment rights infringed by a school board policy requiring disclosure of personal associations). These cases fall far short of articulating any rationale for the Second Circuit's rule.

cedural guarantee of the presumption of innocence has no discernible relevance to the determination of the detainee's substantive rights during confinement. *Hampton* v. *Holmesburg Prison Officials, supra,* 546 F.2d at 1080 n.1.

We would not disagree, of course, that if some discrete condition of confinement could be identified that materially hampered the detainee's interest in obtaining a fair trial (of which the presumption of innocence is simply one subsidiary component), that particular aspect of confinement would be "constitutionally suspect and [could] be justified only by the most compelling necessity." *Campbell* v. *McGruder, supra,* 580 F.2d at 532. But there is no basis for an assumption (and the court of appeals did not conclude) that *every* "privation or restriction" during confinement has such an effect. To the extent that the court of appeals has relied on the presumption of innocence as the basis for its constitutional standard, the court's invocation of the "compelling necessity" requirement is thus plainly overbroad. Cf. *McDonald* v. *Board of Election,* 394 U.S. 802, 807-808 (1969). See also Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance,* 57 B.U.L. Rev. 462, 500 (1977).

It has been suggested that the presumption of innocence has at least some substantive content as "a shield that prevents 'the infliction of punishment prior to conviction.'" *Campbell* v. *McGruder, supra,* 580 F.2d at 529, quoting *Stack* v. *Boyle, supra,* 342



U.S. at 4.[29] But this theory also falls short of providing support for the broad substantive due process requirement formulated by the court of appeals in this case. It cannot reasonably be contended that every "restriction and privation" imposed during pretrial confinement amounts to punishment that may not constitutionally be inflicted prior to conviction for a crime. See *Bijeol* v. *Nelson,* 579 F.2d 423, 424 (7th Cir. 1978). This Court has often observed the distinction between punitive sanctions and regulatory restraints, and noted that the latter may be imposed without any finding of criminal guilt. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 167, 168 (1963) (citing cases).[30] If any particular aspect of pretrial

---

[29] The court of appeals in *Campbell* did not suggest that a rule of compelling necessity was required to assure that punishment was not inflicted prior to conviction. Instead, the court stated that each pretrial restriction must be "carefully examined" to assure that it is justified by the government's legitimate interests (including security, fiscal economy and administrative feasibility) in maintaining pretrial detention facilities. 580 F.2d at 531. See page 45, *infra*.

[30] In determining whether sanctions or restrictions are punitive or regulatory, the Court emphasized the following criteria in *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 168-169 (footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and

confinement constituted improper punishment under the standard articulated in these cases, it would, of course, be impermissible prior to conviction. Moreover, the government may not invoke the objective of punishment in support of general institutional practices and conditions of confinement for pretrial detainees.[31] But there is no basis for any assumption (and, again, the court of appeals did not find) that every institutional restraint during pretrial confinement will be designed for, or result in, punishment prior to conviction.

If a literal interpretation were given to the Second Circuit rule—that all restrictions and privations imposed during pretrial detention must be justified by a compelling necessity—the rule would thus sweep too broadly.[32] While it may be that some aspects of pre-

---

whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

[31] By contrast, restrictions on convicted prisoners may be reasonably related to any valid penological objective such as deterrence of future crime, protection of society, and rehabilitation of the offenders, as well as to institutional concerns for security, order, and administrative feasibility. *Pell* v. *Procunier*, *supra*, 417 U.S. at 822-823. *See Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130.

[32] Although the court of appeals stated that its standard of compelling necessity is "neither rhetoric, nor dicta" (Pet. App. 12a), it is at least questionable whether the Second Circuit intended its rule to be applied vigorously. For example, the court upheld the restriction against detainees' possession of typewriters on the basis of the needs of "prison administration" (Pet. App. 33a). In any event, the court failed con-



trial confinement implicate interests that this Court has recognized as fundamental liberties (*e.g.*, First Amendment freedoms, see *Feeley* v. *Sampson*, 570 F.2d 364, 369 (1st Cir. 1978)), many "restrictions and privations" of confinement impinge only upon the inmates' understandable desire to live comfortably during detention (*i.e.*, possession or receipt of items of personal property). In other contexts not involving the impact on liberty associated with a confinement situation, this Court has determined that the important personal interests in housing or in basic economic well-being do not constitute fundamental interests requiring strict judicial scrutiny. *E.g.*, *Lindsey* v. *Normet*, *supra*; *Dandridge* v. *Williams*, *supra*.[33] Although it may be assumed that the government may not impose arbitrary restrictions or purposeless restraints on these personnel interests,[34] see *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 502, the justification for government action affecting such interests need not be "compelling." Instead, under the traditional due process analysis employed by this Court, unless an institutional practice or condi-

---

sistently to apply the approach of first determining the nature of the constitutional interest affected by the governmental restriction before determining the appropriate standard of governmental justification.

[33] And, of course, an individual's free exercise of rights over his property has not been thought fundamental, but rather subject to reasonable restriction.

[34] "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham* v. *Wright*, *supra*, 430 U.S. at 674.

tion of confinement infringes a specific, fundamental constitutional guarantee, see *Campbell* v. *McGruder*, *supra*, 580 F.2d at 532 (right to a fair trial); *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370 (First Amendment), the basic requirement of due process is satisfied if the condition or practice is reasonable in light of the valid government objectives in maintaining jail order and security and of substantial considerations of fiscal economy or administrative feasibility.[35] *Id.* at 370-371; *Main Road* v. *Aytch*, 565 F.2d 54, 57 (3d Cir. 1977); *Duran* v. *Elrod*, 542 F.2d 998, 999, 1001 (7th Cir. 1976); *Padgett* v. *Stein*, 406 F. Supp. 287, 295 (M.D. Pa. 1975). See also *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531.

We do not mean, by pointing out that many conditions of confinement impinge on liberty interests of a kind that have not been considered fundamental and therefore need not be justified by a showing of compelling necessity, to suggest that the retained liberty interests of pretrial detainees are insignificant or that they may be constricted by administrative whim. While the most fundamental aspect of the liberty of an accused individual committed to pretrial confinement—his right to move freely in society at large like his fellow citizens—has been extinguished by the proceedings leading to his commitment, he nevertheless retains significant liberty interests that are not en-

[35] Fiscal constraints and administrative convenience would not suffice to justify the curtailment of fundamental liberties. *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973).



joyed by those who have been convicted. His situation is closely comparable to that of a person confined after a civil commitment proceeding. In that analogous context, the Court has stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). See *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 249-250 (1972).

The courts of appeals have generally agreed that the essential objective of pretrial confinement is to insure the detainees' presence at trial. *E.g.*, *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369; *Patterson* v. *Morrisette*, 564 F.2d 1109, 1110 (4th Cir. 1977); *Duran* v. *Elrod*, *supra*, 542 F.2d at 999-1000; *United States ex rel. Tyrrell* v. *Speaker*, 535 F.2d 823, 827 (3d Cir. 1976).[36] As the court noted in *Campbell* v. *McGruder*, *supra*, 580 F.2d at 529, however:

> If the government could confine or otherwise infringe the liberty of [pretrial] detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention.

[36] Since persons committed to pretrial detention have not been judged guilty of any crime, administrative restrictions and other conditions of pretrial confinement may not be justified by penological objectives such as deterrence of future crime, protection of society or rehabilitation of offenders. *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369 n.3. See also note 31, *supra*.

Thus, recognition of the legitimacy of the practice of pretrial detention requires further that recognition be given to the government's legitimate interest in managing "the institution of pretrial detention in an administratively feasible manner." *Campbell* v. *McGruder*, *supra*, 580 F.2d at 529. In accomplishing the important governmental interest in producing the detainee for trial, the government must "make the everyday administrative decisions necessary to run" jails as places of pretrial confinement, *ibid.*, adopt rules to "maintain the security of the jail, [and] generally [seek] to sustain the institution of pretrial detention at a feasible cost." *Id.* at 531.[37] Where conditions of confinement not affecting fundamental constitutional guarantees are challenged under the Due Process Clause, it is the reasonableness of the practices that must be considered in determining whether they should be sustained, and the reasonableness must be assessed in light of these valid governmental objectives. *Ibid.*; *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370-371; *Main Road* v. *Aytch*, *supra*, 565 F.2d at 57.

We do not mean to suggest that jail administrators should be allowed to justify any condition of confine-

[37] It is difficult to perceive any limit to the court of appeals' proposition that administrative feasibility and fiscal economy may not be considered in evaluating the constitutionality of conditions of pretrial confinement (Pet. App. 13a). The test adopted by the court of appeals simply assumes for the judiciary the task of legislating the portion of the public fisc to be allocated to the comfort and privacy afforded to persons confined to institutional life.



ment merely by claiming some connection, however tangential, with the needs of jail management. In determining whether the conditions are justified by considerations of cost and feasibility, we think that the existence of more suitable alternatives would properly bear on the reasonableness of the decision of jail authorities to adopt the challenged practice. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 374. Moreover, there may be occasions, as the court of appeals suggested in *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531, where the practice impinges on particularly substantial liberty interests whose character is such that the courts should examine with particular care the governmental justifications to assure that they support the particular restriction involved.[38] And, as

[38] The court of appeals in *Campbell* noted that "infringements on liberties not deemed fundamental might not in general be subject to the strictest scrutiny." 580 F.2d at 531. The court suggested, however, that some form of enhanced scrutiny of the sufficiency of the governmental justification for practices involving pretrial detention is justified to protect the presumption of innocence and the detainees' right not to be punished until proven guilty. 580 F.2d at 531. To assure that the various restrictions and privations imposed on pretrial detainees do not accumulate to constitute prohibited punishment, the court concluded that a careful examination of the reasonableness of the government's purpose is required. *Ibid.*

This formulation of the appropriate standard of review parallels Justice Powell's description of the enhanced scrutiny appropriate under the Due Process Clause where governmental action affects personal liberties that are "deeply rooted" in the Nation's history and tradition. *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 503. See pages 32-35, *supra*.

we indicated at the outset (pages 24-25, *supra*), in each challenge to a condition of pretrial confinement under the Due Process Clause, the government must show that the restrictions imposed satisfy requirements of basic decency and are accomplished in a "reasonable, and hence humane, manner." *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370.

The due process analysis adopted by the court of appeals in this case, however, too broadly requires a "compelling" justification for all "restrictions and privations" of confinement. The court's decision improperly circumscribes the governmental interests that may justify, as reasonable, the practices and conditions of pretrial detention.

3. The difficulties inherent in the due process analysis of the court of appeals are illustrated in its evaluation of the practice of double-bunking in residential rooms at the MCC. The court stated that the government must demonstrate a "compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling" (Pet. App. 17a). But the court's invocation of a retained right to privacy for pretrial detainees does not justify its refusal to consider the government's legitimate administrative and fiscal justifications for double-celling.

The cases in this Court that have defined certain privacy interests as fundamental have never suggested that the interest requires a literal, physical separation of individuals, especially in the context of institutional care or confinement. As the Court ex-



plained in *Whalen* v. *Roe*, 429 U.S. 589, 598-600 (1977):

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

The right to privacy has been drawn from several specific constitutional guarantees which together shelter activities that take place within " 'the sanctity of a man's home,' " *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 484; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 66 n.13 & 67 (1973), and areas of personal and family decision-making, *Roe* v. *Wade*, *supra*, 410 U.S. at 152-153; see *Paul* v. *Davis*, 424 U.S. 693, 712-713 (1976). There is no basis in the reasoning of these cases to support an extension of the constitutional privacy interest to include a right to be separated from other persons during confinement in a jail or other institution.[39]

Although the detainees' interest in personal privacy during pretrial confinement is not within the consti-

---

[39] The conclusion that privacy interests have generally diminished scope in the jail context is consistent with *Lanza* v. *New York*, 370 U.S. 139, 143 (1962), where the Court, in assessing a Fourth Amendment claim, observed that "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." See also *United States* v. *Hearst*, 563 F.2d 1331, 1345 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978); *United States* v. *Strumes*, 549 F.2d 831 (8th Cir. 1977); *United States* v. *Dawson*, 516 F.2d 796 (9th Cir. 1975).

tutional privacy right identified as fundamental by this Court, it nonetheless represents an aspect of individual liberty that we would not denigrate. If this Court is prepared to adopt the view of the plurality in *Moore* that there is a narrow category of interests that, although not fundamental, are so profoundly anchored in the traditions of our society that their restriction must be examined with particular care by the courts, it may conclude that the interest in privacy and human dignity implicated by housing pretrial detainees or civil committees in relatively confined, non-private quarters is such an interest. But such an approach would only justify an insistence that the restriction be shown by the government to be fairly and substantially related to its valid interests. It affords no basis for elevating the detainee's interests in comfort and privacy to the dimension of a fundamental constitutional right protected from governmental infringement except upon a showing of compelling governmental necessity. See *Whalen* v. *Roe*, *supra*, 429 U.S. at 600; *Paul* v. *Davis*, *supra*, 424 U.S. at 713.

If no consideration could be given to fiscal or administrative constraints in determining appropriate conditions of pretrial confinement, it is difficult to articulate any limit to the court of appeals' application of its "privacy" concept: a *per se* ban on the use of any room to hold more than one inmate could logically result. Even the court of appeals, however, has not extended its reasoning to dormitory rooms, having instead indicated that they may be used to house 10



or more inmates (Pet. App. 21a-23a). In the context of pretrial detainees' housing conditions significantly affecting personal privacy, the requirements of due process should thus be satisfied if the conditions of confinement are carefully examined and found to satisfy a minimum threshold of decency and humane treatment and to be reasonable in light of the government's substantial administrative and fiscal concerns. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 374; pages 44-46, *supra*.

### B. The Courts Below Erred In Concluding, On A Motion For Summary Judgment, That Double-Celling of Pretrial Detainees At The MCC Violates The Due Process Clause

Although an inquiry into the reasonableness of government action necessarily entails a factual examination of the means employed and their relationship to legitimate government objectives, the courts below conducted a very limited analysis of the particular circumstances justifying the practice of double-bunking in the residential rooms of the MCC. Indeed, the court of appeals expressly refused to consider the administrative and fiscal interests of the government in its evaluation of the permissibility of the practice (see Pet. App. 12a, 19a). The court thus disregarded efforts made by the Bureau of Prisons to stem the unprecedented flow of inmates into the facility (pages 6-7, *supra*) and the need to retain inmates at the MCC for the convenience of their trials in nearby courts. The court also gave no consideration to the fiscal restraints within which

the Bureau operates or to the costs that would be incurred in altering operating procedures or in using or constructing additional facilities. Nor did the court consider the fact that the enhanced capacity of the MCC facility obtained by double-bunking permits more pretrial detainees to be maintained in the New York area, close to their homes, families, and attorneys, rather than dispersed to federal correction facilities in distant locations primarily designed for convicted inmates.[40] Since these concerns are critical to the determination of whether double-bunking in the residential rooms at the MCC was a reasonable, nonarbitrary administrative response to the needs of jail management, *e.g.*, *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531; *Feeley* v. *Sampson*, *supra*, 570 F.2d at 371, it was error for the court of appeals to exclude them from consideration.

Nor does the record in this case support any conclusion, on a motion for summary judgment, that the practice of double-bunking as employed at the MCC fails to provide minimally decent and humane living conditions. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 371. Although the government maintained in the district court that the question whether double-bunking in the residential rooms affords minimally decent accommodations involves material issues of fact that remain in dispute (Pet. App. 202a), the

[40] Indeed, there is no basis in the record even for concluding that a majority of the inmates themselves would prefer single-celling in the face of the changes in other conditions that might accompany elimination of double-celling.



government nonetheless submitted the affidavit of an experienced correctional psychologist who concluded that " 'double bunking' as practiced at the MCC should not have any significant detrimental effects on the physical or psychological health of the inmates at that institution" (A. 31-32).[41] The factors that led to this conclusion were (A. 32):

> (a) the architectural design and finish of the residential rooms and common areas which convey a non-penal atmosphere and a sense of openness; and (b) the limited period of confinement of any given inmate to the room itself, both in terms of time each day (locked in only for sleeping hours and two court periods), and length of stay (majority of pre-trial inmates are in the MCC 20 days or less).

The affidavit stated further (*ibid.*):

> Although the area of some of the residential rooms used for double-bunking may not be ideal, I have not seen any evidence that the "double-celling" practice at the MCC has caused any untoward effects on individual inmates. It does not appear to be psychologically destructive or an unacceptable deprivation of privacy; and there is no evidence it has prompted any increase of

[41] This case differs from *Campbell* v. *McGruder*, *supra*, which involved smaller and less pleasant rooms in a traditional cell block environment. In *Campbell* there was an express finding that double-celling in those restrictive conditions " 'results in both physical and psychological damage to the inmates * * *.' " 580 F.2d at 536.

deviant sexual or aggressive impulses or tendencies.

The district court reasoned, however, that even though the government's affidavit was unrebutted by any testimony or contrary expert evidence in the record of this case (see note 9, *supra*), it was unnecessary to consider evidence on the issue of the physical or psychological effects of double-celling at the MCC (Pet. App. 210a-211a). The district judge inspected the residential rooms at the MCC and noted that some of them were "musty and unpleasant smelling" and that each possessed a single open toilet (Pet. App. 207a). The court concluded that no testimony was needed to assist its judgment as to the "humiliation and denials of minimal privacy" inherent "when two people are thrown into single cells like these" (Pet. App. 211a). The court stated that it was not required to litigate general propositions about matters of human experience (Pet. App. 211a) because "this case is controlled by the principles of *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975), and a growing list of decisions condemning double celling as unconstitutional" (Pet. App. 207a).

The court of appeals upheld the grant of summary judgment, stating that "[t]he infringements on privacy and personal dignity" observed in the *Detainees* case are "inherent in double-celling in rooms intended for one individual * * *." (Pet. App. 17a-18a, 18a-19a.) The court emphasized that inmate testimony in the *Detainees* case (*id.* at 18a, as amended by *id.* at 41a)



revealed that double-celling had produced numerous disagreements over the choice of activities within the room, and had spawned fights, charges of theft, and frequent involuntary physical contact as two inmates passed each other in the narrow aisle of walking space.

But the conditions presented by double-bunking in the residential rooms at the MCC are markedly different from those observed in *Detainees*. The cells involved in *Detainees* were only 40 square feet in size; most of the residential rooms at the MCC are 70-80 square feet, while others are substantially larger. (Compare Pet. App. 208a, 212a with 520 F.2d at 395.) Pretrial detainees at the MCC are confined to their rooms for only 7-8 hours per day (or about half as long as in the *Detainees* case), during most or all of which they are presumably asleep, and their rooms open into modern and well-decorated multipurpose facilities instead of long barren passageways as in *Detainees*. (Compare Pet. App. 208a with 520 F.2d at 395.) While the record in *Detainees* reflected substantial inmate discomfort associated with the harsher conditions at that jail, there was no evidence before the court to justify any similar conclusion in this case. Indeed, the unrebutted affidavit of the government's psychiatric expert stated that the practice of double-bunking in the residential rooms at the MCC was neither physically nor psychologically injurious and did not impose "an unacceptable deprivation of privacy" (Pet. App. 210a).

In sum, the record before the district court provided no basis for a conclusion that the double-

bunking of pretrial detainees as implemented at the MCC either fails to afford minimally decent and humane conditions [42] or was unreasonable in light of a careful examination of legitimate administrative and fiscal requirements. Rather than imposing, in effect, a rule that double-celling is *per se* unconstitutional, the court of appeals should have vacated the entry of summary judgment and remanded for a more particular evaluation of the nature of and justification for the practice in the precise context of the MCC."

---

[42] In this regard, it is noteworthy that the court of appeals reversed the district court's holding that double bunking in the residential rooms at the MCC was unconstitutional for sentenced inmates. The court noted that the record was insufficient to support a finding that double-celling at the MCC fell below the minimum standard of adequate housing required by the Eighth Amendment (Pet. App. 20a). Other courts that have considered this issue have concluded that the requirement of minimal decency for pretrial housing conditions is essentially equivalent to the Eighth Amendment standard. See page 24, *supra*. There is thus no basis, either in law or on the record of the case, for the court to have reached a different disposition with regard to pretrial detainees in this case.

[43] As was stated in our petition (Pet. 16-17 n.13), the Attorney General has established a Federal Corrections Task Force in the Department of Justice to formulate recommendations for national corrections standards and a federal corrections policy regarding conditions of confinement for both sentenced prisoners and pre-trial detainees. Draft Federal Standards have been issued by the Task Force. Among the various provisions of the draft Standards is a proposal that all cells and detention facilities that have been "rated" for single occupancy should be used to house only one inmate. If this proposal were to be adopted, it would be implemented over a reasonable period of time, and the rated capacity of the facility would be subject to periodic review.

As of the date of this filing, the draft standards remain under continued study within the Department of Justice and have not been adopted by the Attorney General. The draft standards expressly note that they intend to confer no rights or legal cause of action. If the proposed standards, or an amended version of the standards, are at some time adopted by the Department, they would not purport merely to satisfy constitutional minima, but to represent an adoption of liberal administrative goals. By contrast, this case raises the claim that single occupancy of the residential rooms at the MCC is compelled by the Due Process Clause of the Fifth Amendment to the Constitution.



## II

### REGULATIONS THAT ARE REASONABLY RELATED TO THE GOVERNMENTAL INTEREST IN MAINTAINING JAIL SECURITY AND ORDER MUST BE UPHELD

In its evaluation of institutional restrictions that are designed to promote security and order at the MCC, the court of appeals took a different approach than with other challenged conditions. The court recognized that maintenance of security and order is a compelling or inherent necessity of jail administration, and it stated that an "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (Pet. App. 12a-13a). The court noted that under this Court's decision in *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, the administrative determination as to the needs of institutional security and order

is entitled to substantial deference and acknowledged that the courts should not "second-guess the expert administrators on matters on which they are better informed" (Pet. App. 13a). In reviewing several specific institutional security practices claimed to abridge the constitutional rights of inmates at the MCC, however, the court of appeals rejected the determination of correctional officials that the challenged practices serve the facility's substantial interest in security and order. The court held that these security practices were unjustified interferences with the retained constitutional rights of both detainees and convicted inmates, and it enjoined further application of the rules at the MCC.

While the court of appeals purported to follow the principle of deference to correctional judgment in matters of security established in *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, we submit that the court's holdings in fact constitute, on the record of this case, an impermissible intrusion into the affairs of jail management. We do not dispute that convicted prisoners and pretrial detainees alike retain those constitutional rights that are consistent with the nature of their confinement, and that courts must guard against unwarranted interference with these retained interests. *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974). In the case of pretrial detainees, moreover, as we have indicated (pages 23-25, *supra*) these rights encompass retained due process liberty interests not possessed by convicts. Nonetheless, this Court has noted that there are cer-



tain "limitations on constitutional rights * * * which are implicit in incarceration," *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 125, and that both First and Fourth Amendment rights during confinement must be evaluated "in light of the special characteristics of the * * * environment." *Procunier* v. *Martinez*, *supra*, 416 U.S. at 410, quoting *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506 (1969). See also *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129; *Pell* v. *Procunier*, *supra*, 417 U.S. at 822; cf. *Healy* v. *James*, 408 U.S. 169, 189 (1972).

One of the essential characteristics of institutional confinement that has been recognized to be of "central" importance is the need to preserve internal security and order. *Pell* v. *Procunier*, *supra*, 417 U.S. at 823. It is a basic requirement of institutional life that the safety of inmates and correctional personnel be preserved and that the facility be safeguarded from escape. Indeed, if administrators were disabled from imposing reasonable restrictions designed to preserve the safety and order of the institution, successful operation of a jail or prison would not be possible. Accordingly, even when an institutional restriction impinges on basic constitutional freedoms, such as the right of free speech, if the practice is reasonably related to the central objective of maintaining jail security and order, it should be upheld. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130; see *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531.

In this connection, it is appropriate to accord substantial deference to the expertise of qualified correctional officials in the determination of institutional security requirements."[44] *Pell* v. *Procunier*, *supra*, 417 U.S. at 826-828; see also *Feeley* v. *Sampson*, *supra*, 570 F.2d at 373. Moreover, in weighing the legitimacy of security concerns, the burden is not on correctional authorities to show affirmatively that elimination of a particular restriction would be detrimental to the maintenance of security or order. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Instead, courts should ordinarily defer to the expert judgment of correctional administrators and limit judicial inquiry to those occasions when "substantial evidence" indicates "that the officials have exaggerated their

[44] Several experienced and highly qualified correctional authorities testified to explain the necessity for the challenged security practices at the MCC. These included Norman A. Carlson (Director of the Bureau of Prisons; previously Executive Assistant to the Director of the Bureau of Prisons and case supervisor at the federal penitentiaries at Leavenworth, Kansas, and Ashland, Kentucky) (J.A. 2281) and Larry F. Taylor, the Warden of the MCC, the officials responsible for evaluating and implementing security practices at the federal facility. Also testifying on petitioners' behalf were Dr. George M. Camp (Deputy Commissioner of New York State Division of Criminal Justice Services; previously the Director of Missouri Correctional Services and Assistant Commissioner of Corrections for New York City) (J.A. 1379-1380), and Roberts Wright (Associate Executive Director of American Correctional Association; previously the Warden of Westchester County Penitentiary; Member of the New York State Board of Parole and Commissioner of Corrections of Westchester County) (J.A. 1527), who provided an independent evaluation of the security measures at the MCC based upon their experience at other facilities.



response" to the security risks occurring during institutional confinement. *Ibid.*; *Pell* v. *Procunier*, *supra*, 417 U.S. at 827.

The fact that both pretrial detainees and convicted inmates are affected by the security measures at the MCC should not alter this basic analysis, and indeed the court of appeals did not differentiate between the constitutional claims of pretrial detainees and convicted inmates in reviewing the challenged security practices. The paramount institutional concern for preserving the safety of inmates and correctional personnel and safeguarding the facility against escape applies equally to pretrial confinement and convicted incarceration. *Main Road* v. *Aytch*, 565 F.2d 54, 57 (3d Cir. 1977); see also *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531. There is no basis for any assumption that pretrial detainees pose any lesser security risk; indeed, the evidence indicates that the security difficulties are at least as great in pretrial confinement as in convicted incarceration.[45]

[45] While people charged with but not convicted of crimes are presumed to be innocent, that presumption does not in any way ease the task of the jail administrator. Prudence dictates that the jail administrator assume that pretrial detainees pose much the same risk to jail security and order and risk of escape as convicted inmates. Indeed, pretrial detainees constitute a subset of those charged with crime that may reasonably be thought to pose more significant security risks, since their detention has been ordered after a bail hearing at which money bail has been set only for individuals whose appearance cannot be reasonably assured by any less drastic condition. 18 U.S.C. 3146. As a result, those who are detained prior to trial are often individuals charged with serious crimes or with records of prior offenses. Addi-

And the expertise required to evaluate the need for particular security practices in both contexts is possessed by correctional administrators rather than the courts. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Accordingly, other courts have held, as the court of appeals assumed in this case, that when institutional security is the justification for a given restriction, even though fundamental constitutional rights may be implicated, there is no basis for distinguishing pretrial detainees from convicted inmates. *Feeley* v. *Sampson*, *supra*, 570 F.2d at 371, 373; *Main Road* v. *Aytch*, *supra*, 565 F.2d at 57; *United States* v. *Hearst*, *supra*, 563 F.2d at 1345-1346 n.11.

The court of appeals was thus correct in stating that, with regard to both pretrial detainees and convicted inmates, the "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (Pet. App. 12a-13a). The court also correctly observed that the courts should not "second-guess the expert administrators on matters on which they are better informed" (*id.* at 13a). The court failed, however, properly to

---

tionally, unlike the situation in more long-term correctional facilities, the inmate population at a pretrial facility is transient and has not been screened by individualized classification procedures used in connection with convicted prisoners. The specific likelihood of particular detainees being a greater or lesser security risk is not ordinarily established. Prudent security practice thus requires that correctional officials adopt measures that will avert both high and low risk security breaches at pretrial facilities. (J.A. 1393-1398, 1531-1532).



apply these principles in its evaluation of the several specific security restrictions challenged in this case.

**A. The Rule Forbidding Receipt Of Packages From Outside The Jail Was Shown To Be A Reasonable Response To Valid Security Concerns**

Inmates at the MCC are not permitted to receive packages from outside the facility containing items of food or personal property. Government corrections officials testified in the district court that the restriction on the receipt of such packages was necessary to avoid fighting, stealing, and extortion among inmates, and also to limit the introduction of items of contraband into the facility.[46] These officials testified to the serious opportunities that packages provide for the undetected concealment of contraband items, noting that problems range from "the traditional file in the cake" to the concealment of drugs "in heels of shoes, [or] seams of clothing" (A. 80). The Warden observed that the inspection process would constitute an enormous drain on staff resources and that even a thorough inspection would not reliably detect concealed items (A. 67; see *id.* at 80, 85). He also noted that the introduction of personal property into the jail increases the risks of thefts and inmate conflict (A. 67-68, 79).

The district court dismissed these security concerns as "dire predictions" (Pet. App. 162a) and held that the MCC's restriction against receipt of packages was

---

[46] The testimony also noted the storage and sanitation problems that would result from the introduction of food packages (A. 67, 80).

arbitrary and capricious (*id.* at 163a-164a). The court stated that both convicted inmates and pretrial detainees should "be free to retain or receive at least items of the kind available on order from the [MCC's] commissary" (*id.* at 166a) and directed the MCC to promulgate "suitable regulations" regarding the receipt of packages (*ibid.*). The court of appeals affirmed the findings of the district court, adding only that more permissive rules exist at other facilities and that there is "no indication that this greater liberality has resulted in unmanageable difficulties" (*id.* at 32a-33a).

Neither of the courts below identified the constitutional nature of the inmates' interest in receiving packages containing items of personal property while in custody. There is no suggestion in either of the opinions below that restrictions on the use of property in this context implicate any fundamental liberty, such as the right of free speech or expression. Nor do they, in our view, impinge upon basic aspects of privacy or human dignity that we have suggested above might justify careful judicial evaluation. In any event, assuming that an interest in liberty or property is implicated by the challenged restriction, the record affords no support for the courts' conclusion that the restriction on the receipt of packages at the MCC is unreasonable.

Corrections officials testified to the serious security concerns justifying the restriction on the receipt of packages at the MCC. The contrary determination of the district court simply represents its disagree-



ment with the judgment of jail officials regarding the security problems that exist and the means required to control them (see Pet. App. 32a). But it is precisely this sort of unguided substitution of judicial for administrative judgment as to the needs of institutional security that this Court has held to be inappropriate. The unrebutted testimony in this case was that the problems of security and order would be significant if packages were allowed at the MCC. There was no "substantial evidence" in the record, or indeed any evidence at all, indicating that the testimony of the correctional experts was disingenuous or exaggerated. *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 128. *See also Guajardo* v. *Estelle*, 432 F. Supp. 1373, 1386 (S.D. Tex. 1977) ("the potential security risk from packages is substantial and * * * problems of inspection are severe"). In this situation, the institutional restriction should have been upheld: "It is enough to say that [the corrections officials] have not been conclusively shown to be wrong." *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 132.[47]

---

[47] The court of appeals should have applied here the same analysis it applied in a subsequent portion of its opinion in concluding (Pet. App. 33a) that

> the MCC's judgment that the particular problems of security, storage, and theft arising from inmates' ownership of typewriters must override the desire of some to possess them.

The same principle of deference to correctional judgment applies whether typewriters or other items of personal property are involved.

The court of appeals' suggestion that other institutions allow receipt of packages without any "indication" of "unmanageable difficulties" (Pet. App. 33a) does not constitute adequate evidence that the Bureau's concerns for security in this regard are unreasonable or exaggerated. See *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 132. The absence of testimony concerning difficulties encountered at other institutions is not "substantial evidence," or indeed "evidence" at all, in the record of this proceeding. Moreover, the statement of the court of appeals establishes, at most, that some other facilities may regard the security risks as more manageable.[48] This conclusion is not, however, universally shared. See *Guajardo* v. *Estelle, supra*, 432 F. Supp. at 1386. As the First Circuit noted in an analogous context, there may often be "legitimate differences of opinion among state and local authorities as to what practices are safe within their particular institutions." *Feeley* v. *Sampson, supra*, 570 F.2d at 373. The unrebutted testimony in this case was that the security problems would be significant if packages were allowed at the MCC. The determination of correctional authorities that "there is potential danger" in allowing the receipt of packages should not have been dismissed as arbitrary and capricious by the

[48] In view of the limited nature of the individual interest involved in this context, the restriction on packages at the facility would be justifiable even if the administrative interest was merely that of avoiding "manageable" burdens on security personnel.



court of appeals. See *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 133 n.9.

Nor is the court's intrusion into matters of administrative judgment made defensible by the district court's ostensibly narrow requirement that the MCC adopt regulations to allow receipt of packages containing "at least items of the kind available on order from the [MCC's] commissary" (Pet. App. 166a). The security risks are created by the fact that packages arrive from outside the facility; ingenuity can be employed to conceal items of contraband and weapons in food and standardized personal items, as well as other kinds of property. Moreover, to the extent that packages contain only such personal items as are already made available to inmates in the facility's commissary, the requirement that packages containing such items be allowed into the facility increases security risks without achieving any practical difference in the inmates' living conditions. The court's decision has thus improperly overridden and injured the substantial administrative interest in security and order at the MCC without identifying any personal liberty interest advanced or protected by its action.

### B. The Bureau Of Prisons Regulation That Restricts The Receipt By Inmates Of Hardback Books To Those Mailed Directly From Publishers Is A Reasonable Response To Security And Administrative Requirements

The courts below enjoined enforcement at the MCC of the Bureau of Prisons' "publisher only" rule. At the time this case was before the district court, this

rule, which applies to all Bureau facilities, permitted inmates to receive books and magazines only if the materials have been mailed directly from publishers.[49] Federal corrections experts testified in this case to the serious risk to security and order that results when bound materials are mailed to inmates from unidentified sources outside the facility. Hardback books are especially serviceable as a means for smuggling drugs or money into the jail; detection of items secreted in the bindings or between the pages of these materials is difficult, and a thorough inspection would often result in partial or total destruction of the materials (A. 24). The "publisher only" rule is designed to avoid this substantial problem of detecting hidden contraband while still accommodating the inmates' legitimate desire for access to reading materials. The courts below, however, rejected the Bureau's security and administrative justifications and invalidated the rule. The court of appeals held that the rule "significantly intrude[s]" upon the inmates' First Amendment rights (Pet. App. 26a) and concluded that the MCC could "adequately protect its legitimate interests merely by inspecting books and magazines for contraband" (*ibid.*).[50]

---

[49] As recently amended, the rule allows receipt of such materials from bookstores as well as publishers. 43 Fed. Reg. 30576 (July 17, 1978). The Bureau is also in the process of changing the rule to allow receipt of paperback books and magazines from any source.

[50] The Second Circuit distinguished *Woods* v. *Daggett*, 541 F.2d 237 (10th Cir. 1976), which upheld the Bureau's "publisher only" rule, on the ground that that case concerned a maximum security facility (Pet. App. 26a-27a n.26). The court stated that the convicted inmates and pretrial detainees at the MCC pose a far smaller security risk (*ibid.*). There is nothing in the record to support this conclusion. Indeed, the testimony of Bureau of Prisons officials established that the risk of contraband smuggling at the MCC would be substantial without the "publisher only" rule (A. 24) and also noted that detainees and inmates pose equivalent security risks. See note 45, *supra*. The appropriate deference to correctional administrators allows them, and not the courts, to determine the needs of security in these situations. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128.



The court of appeals erred initially in its conclusion that the "publisher only" rule meaningfully interferes with a substantial First Amendment interest. The rule allows books and magazines to be received if mailed from any publisher (and now from bookstores as well). There is no suggestion in the record that this alternative means of obtaining reading materials is burdensome or insufficient. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 827-828. To the limited extent that the rule conceivably might increase the cost of obtaining published materials, this Court has held that where "other avenues" remain available for the receipt of materials by inmates, the loss of "cost advantages does not fundamentally implicate *free speech* values." *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 130-131 (emphasis in original). Furthermore, the MCC has a "relatively large" library for use by inmates, which mitigates any possible harshness of the rule (Pet. App. 26a-27a, 216a). In light of the alternative

channels that remain open for the receipt of materials by inmates and the fact that the rule "operates in a neutral fashion, without regard to the content of the expression," the "publisher only" rule does not materially affect the freedom of expression retained by inmates at the facility. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 828.

Moreover, the court of appeals misplaced the burden of proof in rejecting the administrative and security justifications. Even assuming that First Amendment rights were marginally implicated by the challenged rule, the burden is not on the government to show that the rule is necessary to avert a "present danger" to security and order. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Instead, the restriction should be upheld so long as the government's security concerns are reasonable and not shown by substantial evidence to be an exaggerated response. *Ibid.*; *Pell* v. *Procunier*, *supra*, 417 U.S. at 827.

The Bureau established its substantial need for strict supervision of these materials and the unmanageability of item-by-item inspection. In rejecting this evidence, the district court concluded only that the government's justification swept too broadly. The court stated that "[i]t is evident that * * * literature published in paper or soft covers does not present the danger [government witnesses] cite" (Pet. App. 215a). While it is our view that this conclusion is unsupported in the record of this case and is indeed inconsistent with the testimony that contraband may



be concealed between the pages of such materials, making administrative detection difficult, the Bureau has now proposed to amend its rule to allow the receipt of paperback books from any source. Accordingly, we do not ask this Court to review the district court's holding in the limited context of paperback books and soft covered materials.[51]

Assuming arguendo the correctness of the district court's conclusion with regard to the security risks presented by paperback and soft covered materials, the court's analysis does not in any event support a total invalidation of the Bureau's restriction on the receipt of published materials.[52] Specifically, there

---

[51] Although the Bureau of Prisons proposes to amend its nationwide rule to allow the receipt of paperback books and soft covered materials from any source, the Bureau retains its concern that even exhaustive inspection of these materials cannot detect all concealed contraband. The Bureau regards hardback materials as the more dangerous source of risk to institutional security, however, and proposes to retain the "publisher only" rule in this limited context only.

[52] Any application of "overbreadth" analysis in this context to strike the entire regulation for its partial deficiency would be improper. The cases in which overbreadth analysis has been employed identify two interests to be protected. First, the doctrine may apply where the prohibition attacked is so vague in application that it occasions uncertainty for conduct entitled to special protection. See *Smith* v. *California*, 361 U.S. 147, 151 (1959); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940). Second, the doctrine is applied to modify ordinary rules of standing and ripeness to permit a litigant to raise the "chilling effect" of legislation on fundamental liberties as a basis for seeking an immediate adjudication of its validity. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965); *NAACP*

is no evidence or finding below that would support any conclusion that the rule, as applied to hardback books, is unjustified as a reasonable security precaution. Instead, the only evidence introduced on the issue indicates the reasonableness of the rule, at least with regard to hardback materials, as a moderate and limited response to a significant security concern. Even when weighed against the asserted First Amendment interest implicated by the restriction, "these institutional reasons are sufficiently weighty to prevail." [53] *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 133.

### C. The Visual Body Cavity Inspection Conducted After Contact Visits Is A Reasonable Security Requirement

Inmates at Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as part of the strip search conducted after contact visits with persons from outside the facility. The courts below held in this case that, unless there is probable cause to believe that the inmate is secreting contraband, this intrusive form of inspection violates the Fourth Amendment.

---

v. *Button*, 371 U.S. 415, 433 (1963). But ripeness and standing are not at issue here, and the challenged regulation is not vague in effect. The scope of relief could properly be limited to an injunction against application of the rule to all but hardback materials. As is discussed in the text, there is no basis in the record for any broader ruling.

[53] The claimed restriction on First Amendment interests resulting from the "publisher only" rule, see page 67, *supra*, is materially attenuated by the availability of paperback books from any source under the Bureau's amended policy.



The district court and court of appeals recognized that both detainees and convicted inmates relinquish "some part of those rights to privacy and protection against unreasonable searches and seizures possessed by unincarcerated members of society," and that searches reasonably related to the security of custodial facilities must be permitted (Pet. App. 29a; see *id.* at 148a). See also *Lanza* v. *New York*, *supra*, 370 U.S. at 143; *Bonner* v. *Coughlin*, 517 F.2d 1311, 1316-1317 (7th Cir. 1975); *United States* v. *Savage*, 482 F.2d 1371, 1372-1373 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974). The courts concluded, however, that the evidence presented in this case revealed "little actual utility" to the practice (Pet. App. 30a), and that, in view of the intrusive nature of the search and the availability of less intrusive alternatives, the routine visual inspection of body cavities following contact visits was an unreasonable search procedure.

a. The court of appeals concluded that the visual inspection of body cavities following contact visits was of "little actual utility" because the government "proved only one instance in * * * several years [at the MCC] when contraband was found during a body cavity inspection" (Pet. App. 30a). Substantial evidence has been documented in this record (A. 74-76) and elsewhere (*e.g.*, *United States* v. *Park*, 521 F.2d 1381, 1382 (9th Cir. 1975)), however, of inmate attempts to secrete contraband items into an institution by concealing them in body cavities. The risk of such

attempts is especially significant following contact visits with persons from outside the correctional facility, because such visits "present a unique opportunity for passing contraband, including weapons and drugs, into the Jail." [54] *Feeley* v. *Sampson, supra*, 570 F.2d at 373. Correctional officials testified in this case that visual inspection of body cavities is necessary, as part of the strip search following contact visits, not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the facility (A. 70-72, 83-84). As another court observed in upholding a similar search procedure in *Bell* v. *Manson*, 427 F. Supp. 450, 452 (D. Conn. 1976) (inmates returning from court appearances):

> This type of search enables correctional officers to thwart attempts by returning inmates to smuggle in drugs, money, weapons and other items of contraband which may be small enough to be concealed in a body cavity. Moreover, the detainee's knowledge that such a search will be conducted has a beneficial deterrent effect.

Precisely because of the usefulness of the visual inspection as a means of detecting and deterring

[54] The district court conceded that inmates could secrete objects in rectal and genital areas during the loosely monitored contact visiting procedure at the MCC (Pet. App. 151a). During the trial, the judge asked the government's expert witness whether "a fully-dressed inmate could feasibly or with any frequency secrete contraband in the recum [sic] or something like that?" The witness answered "Absolutely. I know of cases where it has happened" (A. 71).



security violations, the procedure has been upheld by several courts as a constitutionally reasonable search following contact visits.[55] *E.g.*, *Hodges* v. *Klein*, 412 F. Supp. 896 (D. N.J. 1976); *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 (S.D. N.Y. 1975); cf. *Daughtery* v. *Harris*, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973); *Bell* v. *Manson*, *supra*. The conclusion of the court of appeals in this case that the search procedure is of "little actual utility" simply disregards this substantial evidence and improperly substitutes the court's judgment for that of corrections officials as to the security need served by the visual search procedure. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128; *Bell* v. *Procunier*, 417 U.S. at 827; *Bijeol* v. *Benson*, 404 F. Supp. 595 (S.D. Ind. 1975); *Penn El* v. *Riddle*, 399 F. Supp. 1059 (E.D. Va. 1975).

b. In determining the reasonableness of particular search procedures, it is ordinarily unnecessary to inquire into the availability of less intrusive alternatives for conducting the search. As was noted in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976), "[t]he logic of * * * elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-

[55] The district court noted that if an object is inserted beyond the anal sphincter, it would not be detected by the visual inspection procedure. The court agreed, however, that the search procedure "may serve as a deterrent to people planning to secrete and import forbidden things" (Pet. App. 150a-151a).

and-seizure powers." Moreover, the Fourth Amendment requires only that the search not be "unreasonable"; it does not require the government to employ only the "most reasonable" search procedures. See *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970).

Nonetheless, as the district court stated in this case (Pet. App. 151a), the determination whether a particular search procedure is constitutionally reasonable requires "attention to the total setting" of the search. If the legitimate needs of institutional security can be accomplished by significantly less intrusive measures, it may be unreasonable to impose the greater restriction where the lesser would suffice. Cf. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 883 (1975). Such an analysis may be especially appropriate in the narrow context involved here, where the nature of the challenged search procedure implicates notions of personal dignity and decency.[56] But in determining the sufficiency of alternative measures to satisfy the legitimate needs of institutional security, the evaluation of correctional officials must be accorded substantial deference. *E.g.*, *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128; *Penn El* v. *Riddle*, *supra*, 399 F. Supp. at 1062. As is discussed below, the evidence and findings in this case do

[56] The inmate is not touched by security personnel at any time during the visual search procedure. A psychiatrist testified at trial that the visual inspection would not result in any emotional injury to the inmates (A. 82). The district court concluded that the visual search is uniquely personally affrontive even if not emotionally damaging (Pet. App. 150a-153a).



not identify any sufficient alternative to the visual inspection procedure.

The district court suggested that metal items could be detected by less intrusive forms of inspection, such as metal detecting equipment employed by airline security personnel (Pet. App. 151a). The court recognized, however, that drugs and other types of contraband would escape such inspection and that "some contraband will continue to make its way into jails and prisons" (*id.* at 152a). It is obvious that contraband does not have to be metallic to be dangerous or otherwise to pose a risk to institutional security. Indeed, drugs and money alone can create substantial risks to security and order and the safety of inmates. The less intrusive alternative posited by the district court thus falls significantly short of meeting the legitimate objectives of the visual search procedure following contact visits.

Another alternative, not discussed by the court below, would be to monitor individual contact visits constantly and closely in an effort to assure that inmates have no opportunity to secrete contraband items. Such constant and close monitoring, however, would severely tax available institutional resources.[57]

[57] It is apparent that individualized monitoring of contact visits would substantially increase the space, and number of correctional personnel, devoted to this particular aspect of the institutional program. Indeed, it is questionable whether the visiting facilities available at the MCC could be adapted to individualized visiting procedures. These matters were, in any event, not explored by the courts below.

Moreover, it would disrupt the privacy, confidentiality and personal intimacy that contact visitation is intended to afford.[58] These interests are independently significant and entitled to substantial weight in evaluating the reasonableness of the visitation procedure selected by correctional officials at the MCC. The courts below, however, did not evaluate the feasibility or desirability of such an alternative. On this record it cannot be said that the choice of correctional officials to provide for intimate and largely unsupervised contact visits, and to require a complete search following such visits, was not the preferable and reasonable choice. Cf. *Chambers* v. *Maroney*, *supra*, 399 U.S. at 53-54.

In sum, given the difficult task of accommodating inmate interests and correctional security requirements, the search procedure selected at the MCC to guard against the introduction of contraband into the facility following contact visits falls within the range of appropriate discretion afforded correctional officials. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 126.

---

[58] The Draft Correctional Standards (see note 43, *supra*) propose that in circumstances where close and continuous monitoring of inmate contact visits occurs, strip searches with visual body cavity inspections not be required. Even if this proposal is eventually adopted, it would have no application at the MCC. The MCC allows many visitors and inmates to meet in the visiting rooms at one time, and the supervision of such visits is intentionally relaxed to allow for intimate and confidential contact.



### D. The Practice Of Excluding Pretrial Detainees From Their Residential Rooms During Routine Room Inspections Is Justified By The Need To Avoid Disruption Of An Important Security Procedure

In a portion of its decision applying to pretrial detainees only, the court of appeals held that detainees must be allowed to observe routine inspections of their quarters. Substantial testimony was introduced before the district court to demonstrate that permitting detainees to observe room inspections would lead to unnecessary friction between detainees and security personnel and would allow detainees to attempt to frustrate the objectives of the search by distracting personnel and moving concealed contraband from one room to another ahead of the search party.[59] The district court held, however (Pet. App. 156a), that

> [a]t least until or unless [the correctional officials] can show a pattern of violence or other disruptions taxing the powers of control * * * the security argument for banishing inmates while their rooms are searched must be rejected.

---

[59] One of the correctional experts testified (A. 78):

> * * * the requirement that prisoners not be in the immediate area obviously has its basis again in the requirements of security.
>
> It is quite obvious that if a group of officers start a searching process of a housing area at the MCC, if it be a corridor or an area of rooms or in a typical jail if it were a cell block, unless all prisoners are removed from that immediate area, there are a wide variety of opportunities for the confiscation of contraband by prisoners who may have such in their possession and cells.
>
> It can go down the toilet or out the window, swallowed, a wide variety of methods of confiscation of contraband.

The court concluded that the institutional justifications for the rule were insufficient to override the detainees' retained right of privacy (*ibid.*).[60] The court of appeals affirmed, stating that "[w]e see no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege * * *" (*id.* at 31a).

There are two significant errors in the lower courts' analysis of this issue. First, the courts failed to identify any relevant interest in liberty that is affected by the exclusion of detainees from their rooms during routine inspections. The district court stated that excluding detainees from room inspections infringes their interest in privacy. The court's conclusion, however, does not withstand analysis. To suggest that detainees have a reasonable expectation of privacy with regard to physical objects kept within their cell ignores the realities of institutional confinement. See, *e.g.*, *Lanza* v. *New York*, *supra*; *United States* v. *Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973). While routine inspection of quarters may reveal either contraband or lawful items that an inmate would prefer not to be discovered, it would seem beyond dispute that such

[60] The district court accepted the government's claim that the practice of excluding inmates from their rooms during routine inspections made the search more administratively feasible and thus held that, with regard to convicted inmates, the practice is permissible (Pet. App. 157a). Since respondents did not cross-appeal, the application of the room search rule to convicted inmates is no longer at issue.



inspections represent an appropriate security precaution that is permissible as a reasonable search under the Fourth Amendment. See *United States* v. *Hearst*, *supra*, 563 F.2d at 1337. Indeed, neither court below suggested that the practice of performing routine inspections was, by itself, improper. The requirement that detainees remain outside their rooms while such lawful inspections are performed results in no additional interference with the detainees' subjective privacy interest. The search of all physical objects will occur whether the detainees are allowed to watch or not. The requirement that detainees remain outside their rooms during the inspection merely facilitates the safe and efficient performance of the search, it does not independently infringe the detainees' privacy. While it may be only "a small privilege" to allow detainees to observe room inspections (Pet. App. 31a), there is no constitutional content to the privilege sought.

Second, the district court erred in placing the burden on the administrators to prove "a pattern of violence or other disruptions" (*id.* at 156a) to justify the exclusion of detainees from room inspections. Considering the absence of any identifiable liberty interest implicated by the challenged rule, the government's interest in administrative convenience is alone sufficient to justify the exclusion of inmates from routine room inspection. Moreover, where the possibility of a security risk exists, correctional officials "must be permitted to act before * * * the eve of a riot." *Jones* v. *North Carolina Prisoners' Labor*

*Union, supra*, 433 U.S. at 132-133. The burden is not on the government to establish that the precaution of excluding detainees during room inspections is necessary to avert a " 'present danger to security and order.' " *Id.* at 128. The testimony of correctional experts established that, in their judgment, if detainees were allowed to observe room inspections, the security of the institution, and of the guards themselves, would be placed at risk (A. 26, 66, 73). In view of the appropriate deference accorded correctional officials in the determination of security requirements, the absence of substantial evidence in the record to show that these concerns are exaggerated, and the limited nature of the inmate interest involved, this rule should have been sustained.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

KENT L. JONES
*Assistant to the Solicitor General*

SIDNEY M. GLAZER
KATHLEEN A. FELTON
*Attorneys*

NOVEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270263 205

Supreme Court, U. S.
FILED
DEC 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-1829**

GRIFFIN B. BELL, ET AL.,

*Petitioners,*

v.

LOUIS WOLFISH, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
DAVID J. GOTTLIEB
MICHAEL B. MUSHLIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

*Counsel for Respondents.*

JOHN BOSTON,
NANCY LEE,

*Of Counsel.*

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

# INDEX


*Page*

TABLE OF CASES AND OTHER AUTHORITIES CITED ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

QUESTIONS PRESENTED ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT

- A. Introduction ..... 3
- B. Overcrowding By Double-celling ..... 9
- C. Anal And Genital Inspections ..... 15
- D. Cell Searches Conducted In The Detainee's Absence ..... 20
- E. Prohibition On Receipt Of All Personal Property ..... 22
- F. The "Publisher Only" Rule ..... 24

SUMMARY OF ARGUMENT ..... 26

ARGUMENT

- I. THE DUE PROCESS CLAUSE REQUIRES THE GOVERNMENT TO JUSTIFY BY COMPELLING NECESSITY ALL SUBSTANTIAL RESTRICTIONS AND PRIVATIONS IMPOSED UPON PRETRIAL DETAINEES ..... 32
- II. OVERCROWDING BY DOUBLE-CELLING AT THE MCC IS VIOLATIVE OF THE DUE PROCESS CLAUSE ..... 40
- III. THE RECORD ESTABLISHES THAT THE RESTRICTIONS LIMITING RIGHTS OF DETAINEES AT THE MCC WERE GREATER THAN NECESSARY TO SATISFY THE GOVERNMENT'S SECURITY INTEREST ..... 51

A. Visual Inspections Of The Anal And Genital Cavities Were Humiliating And Of Little Utility, And Are Therefore Unreasonable On This Record Under The Fourth Amendment .....54

B. Prevention of Detainees' Observation From A Reasonable Distance Of Frequent And Random Cell Searches Was Properly Held Unreasonable .....60

C. The Total Prohibition On Possession And Use Of Private Property From Outside The Institution Is A Denial Of A Substantial Right And Violative Of The Due Process Clause .....63

D. The Government's Proposed Changes In The "Publisher Only" Rule Warrant A Dismissal Of The Writ Of Certiorari As Improvidently Granted. Alternatively, The Order Below Should Be Affirmed Because The "Publisher Only" Rule Is An Unjustified Infringement On First Amendment Rights .....67

CONCLUSION .....71



## TABLE OF CASES

*Page*

*Ahrens v. Thomas,*
434 F.Supp. 873 (W.D.Mo. 1977),
***affirmed in part,***
***reversed in part,***
570 F.2d 286 (8th Cir. 1978) .....34

*Ambrose v. Malcolm,*
76 Civ. 190 (S.D.N.Y.)
(Stipulation for the Entry of Partial
Final Judgment, Dec. 1, 1978) .....67

*Anderson v. Nosser,*
438 F.2d 183 (5th Cir. 1971),
***reaffirmed in part on rehearing,***
456 F.2d 835 (5th Cir. en banc),
*cert. denied sub nom.* Nosser v. Bradley,
409 U.S. 848 (1972) .....34

*A Quantity of Copies of Books v. Kansas,*
378 U.S. 205 (1964) .....66

*Ashe v. Robinson,*
450 F.2d 681 (D.C. Cir. 1971) .....38

*Battle v. Anderson,*
564 F.2d 388 (10th Cir. 1977) .....41

*Bell v. Burson,*
402 U.S. 535 (1971) ..... 48,65

*Bell v. Manson,*
427 F.Supp. 450 (D.Conn. 1976) .....59

*Benjamin v. Malcolm,*
75 Civ. 3073 (S.D.N.Y.)
(Stipulation for the Entry of Partial Final
Judgment, Dec. 1, 1978) .....67

***Bijeol v. Benson,***
404 F.Supp. 595 (S.D.Ind. 1975) .....60

*Bonner v. Coughlin,*
517 F.2d 1311 (7th Cir. 1975),
***affirmed in part on rehearing,***
545 F.2d 565 (7th Cir. 1976 en banc),
*cert. denied,* 98 S.Ct. 1507 (1978) .....54,62

*Bounds v. Smith,*
430 U.S. 817 (1977) .....35

*Brenneman v. Madigan,*
343 F.Supp. 128 (N.D.Cal. 1972) .....34

*Buchanan v. Warley,*
245 U.S. 60 (1917) .....65

*Califano v. Goldfarb,*
430 U.S. 199 (1977) .....49

*Campbell v. McGruder,*
580 F.2d 521 (D.C. Cir. 1978) .....34,41,42

*Chapman v. Rhodes,*
434 F.Supp. 1007 (S.D. Ohio 1977) .....41

*Cleveland Board of Education v. LaFleur,*
414 U.S. 632 (1974) .....48

*Covington v. Harris,*
419 F.2d 617 (D.C. Cir. 1969) .....38

*Craig v. Boren,*
429 U.S. 190 (1976) .....49

*Cudnik v. Kreiger,*
392 F.Supp. 305 (N.D. Ohio 1974) .....34

*Daugherty v. Harris,*
476 F.2d 292 (10th Cir.),
*cert. denied,* 414 U.S. 872 (1973) .....60

*Davis v. Lindsay,*
321 F.Supp. 1134 (S.D.N.Y. 1970) .....34

*Detainees of Brooklyn House of Detention*
*v. Malcolm,*
520 F.2d 392 (2d Cir. 1975) .....34,42,46



*Detainees of the Brooklyn House of*
*Detention v. Malcolm,*
73-C-261 (E.D.N.Y.) (Stipulation
for the Entry of Partial Final Judgment,
Dec. 1, 1978) .....67

*Detainees of the Queens House of*
*Detention v. Malcolm,*
73 C 1354 (E.D.N.Y.) (Stipulation
for the Entry of Partial Final Judgment,
Dec. 1, 1978) .....67

*Dillard v. Pitchess,*
399 F.Supp. 1225 (C.D.Cal. 1975) .....34

*DiMarzo v. Cahill,*
575 F.2d 15 (1st Cir.), *cert. denied*
*sub nom.* Hall v. DiMarzo, 47 U.S.L.W.
3301 (U.S. Oct. 31, 1978) .....35

*Duncan v. Louisiana,*
391 U.S. 145 (1968) .....35

*Duran v. Elrod,*
542 F.2d 998 (7th Cir. 1976) .....34,47

*Estelle v. Williams,*
425 U.S. 501 (1976) .....48,70

*Eubanks v. Clarke,*
434 F.Supp. 1022 (E.D.Pa. 1977) .....38

*Ex parte Hull,*
312 U.S. 546 (1941) .....53

*Feeley v. Sampson,*
570 F.2d 364 (1st Cir. 1978) .....35,47

*Forts v. Malcolm,*
76 Civ. 101 (S.D.N.Y.) (Stipulation
for the Entry of Partial Final Judgment,
Dec. 1, 1978) .....67

*Frazier v. Ward,*
426 F.Supp. 1354 (N.D.N.Y. 1977) .....54

*Frontiero v. Richardson,*
411 U.S. 677 (1973) .....49

*Fuentes v. Shevin,*
407 U.S. 67 (1972) .....65

*Giampetruzzi v. Malcolm,*
406 F.Supp. 836 (S.D.N.Y. 1975) .....60,62

*Gideon v. Wainwright,*
372 U.S. 335 (1963) .....35

*Goldberg v. Kelly,*
397 U.S. 254 (1969) .....48,49

*Hamilton v. Love,*
328 F.Supp. 1182 (E.D.Ark. 1971) .....34

*Hampton v. Holmesburg Prison Officials,*
546 F.2d 1077 (3d Cir. 1976) .....36,47

*Heller v. New York,*
413 U.S. 483 (1973) .....66

*Henderson v. United States,*
390 F.2d 805 (9th Cir. 1967) .....56

*Hodges v. Klein,*
412 F.Supp. 896 (D.N.J. 1976) .....60

*Houchins v. KQED, Inc.,*
98 S.Ct. 2588 (1978) .....54

*Ingraham v. Wright,*
430 U.S. 651 (1977) .....35,46

*Inmates of Milwaukee County Jail v. Peterson,*
353 F.Supp. 1157 (E.D.Wis. 1973) .....34,69

*Inmates of San Diego County Jail v. Duffy,*
528 F.2d 954 (9th Cir. 1975) .....34



*Inmates of Suffolk County Jail v. Eisenstadt,*
360 F.Supp. 676 (D.Mass. 1973), *affirmed,* 494 F.2d 1196 (1st Cir.), *cert. denied sub nom.* Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974), *reaffirmed as to remedy,*
518 F.2d 1241 (1st Cir. 1975) .....33,41

*In re Jones,*
338 F.Supp. 428 (D.D.C. 1972) .....38

*Jackson v. Indiana,*
406 U.S. 715 (1972) .....37

*Johnson v. Avery,*
393 U.S. 483 (1969) .....53,70

*Jones v. North Carolina Prisoners' Labor Union, Inc.,*
433 U.S. 119 (1977) .....28,52,53,70

*Jones v. Wittenberg,*
323 F.Supp. 93 (N.D. Ohio 1971), *affirmed on other grounds sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) .....33

*Kennedy v. Mendoza-Martinez,*
372 U.S. 144 (1963) .....38

*Loe v. Armistead,*
582 F.2d 1291 (4th Cir. 1978) .....47

*Lynch v. Household Finance Corp.,*
405 U.S. 538 (1972) .....64,65

*Maldonado v. Ciuros,* 76 Civ. 2854 (S.D.N.Y.) (Stipulation for the Entry of Partial Final Judgment, Dec. 1, 1978) .....67

*Marcus v. Search Warrant,*
367 U.S. 717 (1961) .....66

*Martin v. Struthers,*
319 U.S. 141 (1943) .....68

*McGinnis v. Royster,*
410 U.S. 263 (1973) .....35

*McNeil v. Director, Patuxent Institution,*
407 U.S. 245 (1972) .....37

*Miller v. Carson,*
563 F.2d 741 (5th Cir. 1977) .....34

*Mitchell v. W.T. Grant Co.,*
416 U.S. 600 (1974) .....65

*Moore v. City of East Cleveland,*
431 U.S. 494 (1977) .....28,47,48,49

*Morgan v. LaVallee,*
526 F.2d 221 (2d Cir. 1975) .....69

*Norris v. Frame,*
No. 78-1090 (3d Cir. Oct. 31, 1978) .....34,36

*North Georgia Finishing, Inc. v. Di-Chem, Inc.,*
419 U.S. 601 (1975) .....65

*Owens-El v. Robinson,*
442 F.Supp. 1368 (M.D.Pa. 1978) .....69

*Patterson v. Morrissette,*
564 F.2d 1109 (4th Cir. 1977) .....34

*Penn El v. Riddle,*
399 F.Supp. 1059 (E.D.Va. 1975) .....60

*Procunier v. Martinez,*
416 U.S. 396 (1974) .....32,53

*Red Lion Broadcasting Co. v. F.C.C.,*
395 U.S. 367 (1969) .....68

*Reed v. Reed,*
404 U.S. 71 (1971) .....49

*Rhem v. Malcolm,*
507 F.2d 333 (2d Cir. 1974) .....35



*Sanks v. Georgia,*
401 U.S. 144 (1971) ..... 68

*Schmerber v. California,*
384 U.S. 757 (1966) ..... 62

*Seale v. Manson,*
326 F.Supp. 1375 (D.Conn. 1971) ..... 34

*Sniadach v. Family Finance Corp.,*
395 U.S. 337 (1969) ..... 65

*Stack v. Boyle,*
342 U.S. 1 (1951) ..... 35

*Stanley v. Georgia,*
394 U.S. 557 (1969) ..... 68

*Stanley v. Illinois,*
405 U.S. 645 (1972) ..... 48

*Taylor v. Sterrett,*
532 F.2d 462 (5th Cir. 1976) ..... 34

*Tyler v. Ciccone,*
299 F.Supp. 684 (W.D.Mo. 1969) ..... 34

*United States v. Asbury,*
No. 78-1149, slip op. 5137
(2d Cir. Nov. 13, 1978) .....55,60

*United States v. Guadalupe-Garza,*
421 F.2d 876 (9th Cir. 1970) .....55,60

*United States v. Lilly,*
576 F.2d 1240 (5th Cir. 1978) .....54

*United States v. Martinez-Fuerte,*
428 U.S. 543 (1976) .....55

*United States v. Ortiz,*
422 U.S. 891 (1975) .....55,61

*United States v. Savage,*
482 F.2d 1371 (9th Cir. 1973),
*cert. denied,* 415 U.S. 932 (1974) .....54

*United States v. Smith,*
557 F.2d 1206 (5th Cir. 1977),
*cert. denied,* 434 U.S. 1073 (1978) .....60

*United States ex rel. Tyrrell v. Speaker*,
535 F.2d 823 (3d Cir. 1976) .....34

*Vlandis v. Kline*,
412 U.S. 441 (1973) .....48,49

*Watson v. City of Memphis*,
373 U.S. 526 (1963) .....48

*Wayne County Jail Inmates v. Wayne County Board of Commissioners*, Civ. Action No. 173217, Opinion on Motion for New Trial and Motion to Amend Judgment (Cir. Ct., Wayne County, Michigan, July 28,1978) .....53

*Weinberger v. Salfi*,
422 U.S. 749 (1975) .....49

*Wilson v. Beame*,
380 F.Supp. 1232 (E.D.N.Y. 1974) .....34

*Wolff v. McDonnell*,
418 U.S. 539 (1974) .....32

*Wyatt v. Stickney*,
344 F. Supp. 387 (M.D.Ala. 1971), *affirmed in part, remanded in part, reversed in part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974) .....38

## OTHER AUTHORITIES CITED

*Page*

American Correctional Association,
MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (1977) .....41

American Public Health Association,
STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (1976) .....41

4 W. Blackstone, COMMENTARIES *300 .....32

Fed.R.Civ.P. 60(b) .....68



Fried, *Privacy*,
77 Yale L.J. 475 (1968) .....43

National Advisory Commission for Criminal Justice Standards and Goals,
CORRECTIONS (1973) .....32,41

National Sheriffs' Association,
A HANDBOOK ON JAIL ARCHITECTURE (1975) .....41

United Nations Congress on the Prevention of Crime and the Treatment of Offenders,
STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS AND RELATED RECOMMENDATIONS (1955) .....41

United States Bureau of Prisons,
THE JAIL: ITS OPERATION AND MANAGEMENT (1970) .....42

United States Department of Justice,
DRAFT FEDERAL STANDARDS FOR CORRECTIONS (1978) .....42,44,57,69

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

---

**No. 77-1829**

---

GRIFFIN B. BELL, ET AL.,

*Petitioners,*

v.

LOUIS WOLFISH, ET AL.,

*Respondents.*

---

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

## BRIEF FOR RESPONDENTS

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-37a) is reported at 573 F.2d 118. The opinions of the district court (Pet.App.74a-225a) are reported at 439 F.Supp. 114 and 428 F.Supp. 333.

## JURISDICTION

The respondents adopt the jurisdictional statement contained in the brief of the government.

## QUESTIONS PRESENTED

1. Whether the government may impose substantial restrictions and privations upon pretrial detainees, beyond those necessary for safe custody and jail security, without the justification of a compelling governmental necessity.

2. Whether the overcrowding by forced double occupancy of single-person cells at the Metropolitan Correctional Center is violative of the Due Process Clause.

3. Whether the government is sufficiently justified in (a) conducting humiliating visual anal and genital inspections of all detainees after supervised contact visits without regard to actual suspicion of contraband; (b) forbidding detainees to watch, from a reasonable distance, the government's frequent and random cell searches; and (c) prohibiting the receipt by detainees of all items of personal property from outside the institution.

4. Whether the significant post-judgment changes in the government's position concerning receipt of literature by inmates warrant dismissal of the writ of certiorari on this issue as improvidently granted; and if not, whether the government is sufficiently justified in prohibiting the receipt by detainees of all books, magazines, and other literature from any source other than the publisher.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

To those provisions contained in the brief for the government, respondents add the First Amendment to



the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT

### A. Introduction

The Metropolitan Correctional Center (MCC) was built primarily to house pretrial detainees. The institution also houses inmates waiting imposition of sentence or designation to another institution, and a group of sentenced inmates—numbering more than 100 at the inception of this litigation—designated to serve their sentences at the MCC for the purpose of working at the institution. Pet.App.19a, 74a-75a, 202a; S.A.27 para 6.[1]

The principal architectural feature of the institution, which opened in August, 1975, in downtown Manhattan, was the functional, or "modular," housing unit. Two of these mostly self-contained units made up a typical housing floor. Each unit had several clusters of cells.[2] The cells, which were designed to accommodate

[1] Numerical references preceded by "A" refer to the joint appendix in the Court. "Pet.App." references are to the appendix to the petition for writ of certiorari. "S.A." references are to the supplemental appendix of the parties in the Court. "Pet.Br." references are to the government's brief. "J.A." references are to the joint appendix in the Second Circuit. "Tr." references are to pages of the trial transcript.

[2] The second and third floors contain one unit per floor; one of the units on the eleventh floor contains six dormitory rooms.

one inmate, open to corridors which, in turn, lead to a multipurpose activity room. S.A., *passim*. Thus, when opened, the 12-story structure had no indoor gymnasium, ground-level recreation area, central chapel, auditorium, reading room or dining area. Inmates might not leave their housing unit to go to the general or law library or the commissary. Classrooms were in the unit. All activities and services for detained persons were provided, with few exceptions—such as sick call and a daily rooftop exercise hour when the weather permitted—directly in the housing unit, rather than in central facilities serving the entire institution. Pet.App. 77a-80a, 91a, 98a, 100a, 111a, 208a n.6.

The institution was designed to accommodate 449 inmates. Pet.App.115a. However, within three months of opening, population within the institution expanded. Plans were developed to accommodate what Warden Taylor described as an "expected increase" in population, to exceed 600 inmates. A.21, 23, 33. Individual cells were fitted to house two inmates by installation of bunk beds; single beds in the dormitory unit were also replaced by bunk beds, doubling the population of that unit; and beds were also placed on the balconies of the multipurpose rooms and in the corridors of the residential units. Pet.App.115a-129a, 203a.

Doubling the dormitory population produced conditions of "intolerable crowding, strain, and distortion of facilities . . . ." Pet.App.121a. Toilet facilities were rendered "grossly inadequate," as were equipment and facilities for eating, recreation, and reading. Pet.App. 122a-123a. To salvage some modicum of privacy, inmates who occupied the lower bunks hung bedding



from the upper bunks to fashion tentlike enclosures, J.A.458, or placed towels over their heads. J.A.1951. Muslim inmates said their daily prayers in the lavatories. J.A.694. Furniture was added to the dormitory rooms which, while still insufficient for the doubled population, left the rooms so crowded that there was "scarcely room to move about." Pet.App. 122a.

An average of 27 inmates each night slept in corridors and balconies; some inmates remained in these areas for longer than a week. Pet.App.20a.[3] Not only did these inmates lack any private space, they were forced to attempt to sleep under lights shining 24 hours a day. Pet.App.20a-21a.

Superimposed on this environment was a host of institutional restraints. There was virtually no classification of pretrial detainees, including those who were double-celled. Pet.App.92a-93a. The institution was built without provision for an attorney-client visiting room. Thus, visits with attorneys took place in the general visiting rooms, "entailing long delays" and "totally vitiating confidentiality." Pet.App.35a. There were also substantial delays in processing social visitors, and visits were terminated early because of overcrowding and noise. Pet.App.131a. After each visit, inmates were required to submit to a strip search, which included a visual inspection by guards of the inmates' anal and genital areas.

[3]Given these findings by the district court, affirmed on appeal and unchallenged by the government here, the government's assertion that this unconstitutional housing occurred for but brief periods and to only a small number of inmates (Pet.Br.7) is inexplicable.

Random and frequent cell searches were conducted outside the inmates' presence; any item found was subject to seizure at the whim of a correctional officer. There was no requirement that inmates be notified of which items were taken. Nor was there an opportunity to challenge the seizure. Some inmate property was destroyed or never returned. Pet.App.154a, 158a-159a. All packages from outside the institution were prohibited, except for one at Christmas. Pet.App.162a. Inmates were not permitted to receive books or other printed material from outside the institution except from a publisher. A.24. The law library—no more than a storeroom—lacked many essential titles, and inmates were not permitted to engage in research in the library. Pet.App.102a-103a. Confidential mail received from attorneys was opened and read on a regular basis by correctional officials outside the presence of the inmate-addressee, in violation of the institution's own regulations. Pet.App.144a.[4]

In these circumstances, on November 28, 1975, inmates of the MCC filed the instant suit *pro se*. On December 29, 1975, the court assigned counsel and ordered that the case proceed as a class action. An amended petition was thereafter filed.

On January 28, 1976, following the government's announcement that visiting hours were about to be

[4]The institution also regularly forbade inmates in administrative detention the opportunity for daily exercise, despite its claim to the contrary. Pet.App.176a. Guards of one sex would, without announcement, enter the cells or toilets of inmates of the opposite sex when the inmates were in varying stages of undress. Pet.App.184a-185a. Another regular practice of the institution was to lock women, all of whom were housed in cells without toilets, into their cells for substantial periods of time for disciplinary or other reasons. Pet.App.177a-178a.



reduced sharply, the district court preliminarily enjoined such reductions in order to maintain the status quo pending the outcome of the litigation. 406 F.Supp. 1243 (S.D.N.Y. 1976); Pet.App.129a-130a. On October 1, 1976, following a similar announcement by the institution concerning telephone service, and for the same reasons, the district court issued a preliminary injunction. Pet.App.140a-141a.

Prior to trial, the parties moved for partial summary judgment. On January 5, 1977, the district court ordered that the institution end double-celling of both pretrial and convicted inmates (see *infra* at 9ff.), and prohibited continued enforcement of the "publisher only" rule (see *infra* at 24ff.). The court also ordered that correctional officers give receipts for items taken from inmate cells and prohibited the reading of outgoing mail without cause. Pet.App.9a.[5] On September 15, 1977, after a full trial, the district court decided the outstanding claims. Afterward, the court required the MCC to end housing in the common areas and overcrowding in the dormitories; to begin classification of inmates who posed a serious threat of violence or escape; and to maintain improvements made in its attorney and social visiting system. Pet.App.93a-94a, 125a-126a, 129a, 133a, 137a.[6] The court, while per-

[5]The court dismissed respondents' request for an order requiring the practice of opening all incoming mail in the inmate's presence and deferred resolution of the other issues until trial. Pet.App.9a.

[6]During the course of the litigation, the institution "repeatedly found it suitable . . . to improve conditions of which [respondents] complained." Pet.App.133a. Among these changes announced by Warden Taylor in his testimony were increased visiting hours, improved visiting procedures, and construction of an attorney visiting area. The district court concluded that "[i]t is plain that most of these improvements have been spurred by the lawsuit and would not have happened otherwise." Pet.App.133a.

mitting strip searches, prohibited the anal and genital visual inspections by correctional officers except on probable cause (see *infra* at 15ff.). The court directed that pretrial detainees be allowed to observe, from a reasonable distance, searches of their cells, and ordered that the total prohibition on inmates' receipt of packages from outside the institution be ended. Relief was ordered on a number of other issues.[7] In addition to granting relief for conditions violating the constitutional rights of detainees, the district court found a right to relief from arbitrary administrative action under the Administrative Procedure Act. Pet.App. 84a.

The court of appeals rejected the district court's determination on the applicability of the Administrative Procedure Act. Pet.App.14a-15a. However, the court determined that, in most instances, the district court's order "cured serious constitutional deficiencies in the operation of the MCC." Pet.App.2a.

Thus, the court affirmed the district court's decree enjoining the overcrowding caused by double-celling detainees,[8] by doubling the dormitory population, and

[7]The institution was directed, *inter alia*, to devise a system by which inmates could contest the seizure of property; to adhere to its own policy of opening legal mail only in the presence of the inmate-addressee; and to upgrade the law library. The court also denied relief on a number of respondents' claims. See, *e.g.*, Pet.App.186a-188a (admissions and transfers); 191a-195a (grievance procedures); 196a (ventilation and temperature). Decision on the issue of medical care was deferred pending a hearing before a magistrate. Pet.App.198a.

[8]The court of appeals vacated and remanded the question of whether double-celling for convicted inmates at the MCC constituted a violation of the Eighth Amendment. The court of appeals held that the district court had applied an incorrect legal standard to judge the conditions of confinement of double-celled convicts, but observed that, on remand,

*(continued)*



by housing inmates in the balconies and corridors of the institution. The court also upheld the district court's prohibition of routine anal and genital inspections, and its orders invalidating the publisher-only rule and the prohibition on receipt of packages. The court further affirmed the district court's order with respect to observation of cell searches. Pet.App.26a, 29a-33a.[9]

In the course of its opinion, the court of appeals contrasted the noble intentions of the designers of the MCC with the actual conditions within the institution, and called to mind the well-known statement of Samuel Johnson that "Hell is paved with good intentions." Pet.App.5a. We turn now to a detailed description of the factual record underlying the decisions of the court of appeals which the government now challenges.

## B. Overcrowding by Double-Celling

The cells in the MCC which housed pretrial detainees ranged from 75.9 to 77.66 square feet in size.

*(footnote continued from preceding page)*

"the trial court may well find that double-celling in a 75-square foot room violates the Eighth Amendment." The court noted, however, that some of the rooms housing convicted inmates at the MCC measured up to 150 square feet, double the size of the rooms used for detainees. Pet.App.19a-20a.

[9]The court sustained the district court's conclusions, not challenged here, that the attorney visiting and law library regulations previously enforced violated the inmates' right of access to the courts, that the mail regulations at the MCC violated the inmates' First Amendment rights to receive and send mail, and that classification be instituted to permit additional movement within the institution. Pet.App.23a, 27a, 35a. The court reversed the district court's order, *inter alia*, striking down the institution's rule requiring inmates to wear jumpsuits, and vacated the order on social visiting and telephones.

Built into each was an uncovered toilet and sink, a towel rack, a 2′ x 4″ shelf, a mirror and light fixture, and a bookshelf. Furnishings consisted of a bed with two drawers, a desk, a chair, a lamp, and a wall bracket. Pet.App.203a; S.A.9, 12, 15, 17-18, 20.

The toilet is placed diagonally into the cell, and juts some two feet into the center of the cell beyond the door when it is closed. Each cell contains a window and an air vent. The placement of furniture leaves the inmate with a narrow aisle of some 30 square feet in which to move about. Pet.App.203a.[10]

Inmates are locked into their cells from 11:00 p.m. to 6:30 a.m.; at 4:00 p.m. until the afternoon count is completed; at 7:30 p.m. until the evening count is completed; and for disciplinary reasons. S.A.27.[11]

The cells open to corridors which, in turn, lead to the multipurpose room where the inmates may spend time when they are not locked into their cells. The institution contains no central facilities, and inmates eat, visit, and have indoor recreation, exercise,[12] and educational programs in the multipurpose rooms. Pet.App. 5a, 23a. The multipurpose rooms contain pantries

[10]See architectural plans attached as Exhibit 1 to the government's statement pursuant to Rule 9(g), Local Rules, United States District Court, Southern District of New York, which statement is the Supplemental Appendix to the Court.

[11]Later in the proceedings, it was learned that during the midnight to 8:00 a.m. shift, only one correctional officer patrolled the two largely independent and separate modular units on each floor. J.A.2561. To attract a guard's attention, an inmate had to pound on a locked cell door until the guard responded. Tr.1033-1034, 1154-1155; see J.A.621; Pet.App.179a.

[12]An inmate is allowed seven hours each week for exercise on the MCC's roof when weather permits.



furnished with one microwave oven. Tables for eating range in number from 3 to 14; and chairs vary in number—23, 30, 32, 43, and 57[13]—in addition to two or three lounge chairs and four or five couches. Also provided are one jogging machine, one medicine ball, and one exercycle. S.A.5, 10, 13, 14, 18, 21, 24.

The cells at the MCC were planned, designed, and constructed by the government to house only one person per room. The uncontradicted sworn statement of Paul Silver, the MCC architect, was that "the rule that we began with was that for every room we would only provide one—to put one man in a room." Silver believed that this "basic planning principle" had established a "population capacity" for the cells, that it would be a "very clear and apparent violation of capacity when you try to put two people in a room," and that conversion to double-bunking would be a "clear violation of the capability of that space." The architect concluded: "There is more than enough, you know, objections to double-celling." A.9.

Nevertheless, when, within four months of the opening of the MCC, its population began rising from its rated capacity of 449, and when it was predicted that the population would increase still further, the government turned immediately to the solution of housing two detainees in each cell. A.21, 33. Approximately one-third of the cells in the institution—120 of them—were altered for double occupancy. Affidavit of Warden Taylor dated December 10, 1975, referred to at A.21, 23. By late December 1976, as many as 73 cells

[13]S.A.5, 10, 13, 14, 18, 21, 24. The women's unit, which was never double-celled, is not included in this count.

were already housing two inmates. A.34. Of that number, 35 cells in two of the units were being used to house pretrial detainees. A.33.[14] There was no effort to classify the detainees who were double-celled to eliminate, for example, inmates with a history of violent behavior. See A.34-35.

During this same period a group of 103 convicted and sentenced inmates, known as "the cadre," were housed at the MCC as part of the institution's work force. S.A.27; Pet.App.19a. Prior to the district court's order prohibiting double-celling, none of these sentenced prisoners was transferred out of the MCC to alleviate the overcrowded conditions. Tr.1887-1888; Pet.App.19a; see also A.22-24. Rather, cells for detainees as well as sentenced inmates were altered by replacing the single beds with bunk beds and, in some cases, adding a second chair. A.21; S.A.12 n.; 17 n. The bunk beds were placed against the wall so that cold air from the air vent blew one foot above body level on the upper bunk. Pet.App.206a. The placement of the bunk beds necessitated the dismantling, and often the removal, of the drawers used by inmates to store their few possessions. Pet.App.207a.

On December 22, 1976, at the government's own suggestion, the district judge visited the institution to observe the "physical facts of double celling." Pet.App. 203a. During his visit, the district judge observed that the double bunks were placed so that the air vent blew

[14]These two units were 7-N and 9-N. S.A.26. All 24 cells in Unit 3, the unit housing government witnesses in protective custody, S.A.26, were designated for double-celling, and up to 41 people had been housed in the unit. A.33-34. In Unit 2, the honor unit housing convicted people and the "cadre," S.A.26, 14 cells were double-occupied. S.A.2; A.33.



cold air on the upper bunk a foot or so above body level; that, to cope with this "architecturally unintended unpleasantness," inmates had blocked the air vents; and that, as a result, the cells were rendered musty and unpleasant smelling. He also saw that shelf space, adequate for one inmate, was not adequate for two, and that the removal of all the storage drawers from many of the cells left no place for inmates to store personal items. And he noted that the placement of furniture in the room left only a narrow aisle for walking. Pet.App.203a, 206a-207a.[15]

Finding the open toilet a "stark centerpiece," Pet.App.211a, the court observed that there was no place for each of two people to "walk or eat or write a letter or be quiet or be outside another's toilet." Pet.App.206a. The court concluded that, under these circumstances, forcing an inmate to live with an "unselected companion" not only constituted a denial of decency and privacy, but of "personal security" as well. Pet.App.207a, 211a.[16]

The court further found that double-celling not only denigrated an inmate's dignity, security, and privacy in the cell, it affected the operation of the unit's multi-

[15]See also the architectural plans, attached as Exhibit 1 to the government's statement pursuant to Rule 9(g), Local Rules, United States District Court, Southern District of New York, which statement is the supplemental appendix to the Court.

[16]The problems and conflicts arising from these overcrowded conditions were confirmed by testimony at the later trial that among the worst features of dormitory overcrowding were the conflicts which resulted when people of differing habits were thrown together in the small space and the denial of privacy resulting from the use of lights by one person when another wanted to sleep, or the playing of radios at a loud volume. J.A.448, 815, 820-821. These findings were not appealed.

purpose room as well—the overcrowding taxed available facilities beyond their capacity and rendered them congested and noisy. Pet.App.207a.[17] The result, the court concluded, was that "[t]here is more pressure to eat in the cell, with its single chair, open toilet, and unselected companion." Pet.App.207a.

Having observed firsthand the conditions resulting from double-celling, the court found them "fundamental denials of decency, privacy, personal security, and, simply, civilized humanity. . . ." Finding the qualities of "threat, nausea, and degradation . . . visible and palpable for any observer," the court concluded (Pet.App.211a-212a):

> So, here, he who walks slowly and observes can read the uncontradicted evidence of circumstances that the law has now come to denounce as less than the constitutional minimum for the confinement of fellow human beings.

Based upon his personal observations, and after reviewing the extensive papers and exhibits, most of which were filed by the government, the court concluded that there "appear to be no genuine issues as to facts fairly to be deemed material," Pet.App.203a, and ordered relief on a motion for summary judgment.[18]

[17]The size and layout of the multipurpose rooms establish that they were planned and constructed for the "allotted number of single room occupants," and that they were not adequate for more than 48 inmates. Indeed, the district judge observed the obvious: that three pieces of exercise equipment, chairs which may number fewer than 10, and tables for eating usually numbering 7 or 10, were not adequate to meet the needs of a double-celled population. Pet.App.207a.

[18]The court considered the supporting affidavit filed on behalf of the government by William Menninger. While not disputing the factual observations made by Dr. Menninger, the court found that his opinions drawn from these facts failed to raise a triable issue. Pet.App.211a.



To comply with the district court order ending double celling, the institution reduced the number of sentenced "cadre" inmates from 103 to 21. Pet.App. 19a. "Cadre" jobs were then filled by pretrial detainees and sentenced prisoners present at the MCC on writs of habeas corpus. J.A.1229-1230. Reduction of the sentenced "cadre" occurred within 60 days, and no further stay of the double-celling order was sought. J.A. 3043.[19]

The court of appeals affirmed the findings of the district court that the condition of double-celling at the MCC resulted in "infringements on privacy and personal dignity," Pet.App.17a-18a, noting both the adverse effect on the detainee in his cell and the impact of overcrowding on the multipurpose common areas. The court also observed that the elimination of double-celling had been accomplished "merely by reducing [the institution's] permanent work 'cadre' of convicted inmates designated to serve their sentences at MCC . . . ." Pet.App.19a.

### C. Anal and Genital Inspections

After each contact visit with a family member or friend, an inmate was taken to a small room near the visiting area where he or she was stripped and subjected to a visual examination of his or her anal and genital

[19]The institution has not double-celled inmates since March 1977—almost two years ago. Further, since August 28, 1978, when the order limiting the institution's total population to its functional capacity of 449 became effective, no emergency which, under the court's order, would permit double-celling for up to 10 days, Pet.App.51a, has been certified.

areas. Under a guard's supervision, inmates stripped naked, displayed their armpits, lifted their feet, and opened their mouths. Men lifted their genitals, and women assumed a position to facilitate a vaginal perusal. All inmates were required to bend over and spread their buttocks to allow a visual inspection of the anus. A.36; Pet.App.149a.

Dr. Frank L. Rundle, former chief psychiatrist for the New York City prison system, said that the strip search procedures required the inmates to assume a posture as humiliating as is possible in our culture. A.48-49.[20] Another expert, William Nagel, testified that requiring an inmate to expose his anus was an indignity "reducing a human being to a less than human quality." A.45.[21]

[20]At the time of the litigation, Dr. Rundle was supervising psychiatrist for the Lower East Side Service Center in New York City. As chief psychiatrist for the New York City detention facilities, Dr. Rundle had previously administered a staff of 300 and had supervised a budget in excess of $4,000,000. In addition to his position as chief psychiatrist for all New York City jails, Dr. Rundle had previously served as chief psychiatrist for the New York City Detention Facility at Rikers Island as well as for the California Training Facility at Soledad. Dr. Rundle had also served as an adviser to a federal judge of the Southern District of New York in a prison conditions case. J.A.736-738.

[21]William G. Nagel was Executive Vice-President of the American Foundation, Inc., and Director of the Institute of Corrections of the American Foundation. He had previously served as assistant superintendent and deputy warden of the New Jersey Correctional Institute at Bordentown; as Executive Secretary for Human Services in the Office of the Governor of Pennsylvania; as a consultant to the National Council on Crime and Delinquency and the President's Commission on Law Enforcement; and as a member of the National Advisory Commission on Criminal Justice Standards and Goals. Mr. Nagel had been a witness in previous cases for the Civil Rights Division of the United States Department of Justice. J.A.681-686.



Dr. Rundle, who has witnessed many such searches, maintained that, "almost without exception," they engendered "psychological sadism" among the guards and caused a correlative fear among inmates of sexual assault. A.49. This general assessment was given concrete expression by the testimony of an MCC guard who, when asked, was unable to deny that he might have told an inmate, in the course of a strip search, that he was going to "kick his ass," as well as by an inmate who testified that, during a strip search, an officer had threatened to "put his foot up" the inmate's "ass." Indeed, the psychological toll of the strip search procedure was such that inmates chose to forego visits rather than subject themselves to it. A.36-37, 57, 77.

The proffered justification for the anal and genital inspection was to prevent smuggling of small weapons and contraband into the prison. A.83-84; J.A.1225. However, the uncontradicted testimony of medical experts established that the anal inspection procedure was virtually useless, since contraband could be concealed in this area only if it was held between the buttocks or inserted into the rectum. If the item was held only between the buttocks, it would require that the inmate walk in an unnatural gait which would easily be detected without a cavity inspection. Both Dr. Rundle and the government's expert, Dr. Menninger, agreed that any contraband inserted into the rectum, beyond the anal sphincter muscle, would not be observed in a visual inspection. A.49-50, 82-83. Further, concealment would not only be a difficult and painful procedure, it would require time and opportunity not available in the visiting area. A.49-50. A correctional expert for respondents testified that he

was unable to recall a single instance, in his experience, of contraband being smuggled into an institution in an inmate's rectum. A.45.[22] No evidence was introduced by any of the witnesses for the government of a single item of contraband having been smuggled into the MCC in this way.[23]

The utility of these procedures was also offset by precautions taken with respect to visitors to the institution. As they entered the main lobby, visitors passed through a magnetometer and were examined with a metal detection device; some visitors were patted down. A.93; J.A.600, 601-602, 1077. The uncontradicted expert testimony was that, with these metal detection devices, no realistic possibility existed that weapons could be smuggled into the institution. A.45. Further, a fluoroscope was available for use, and brief cases and all packages, including women's purses, were opened and searched by hand. A.93; J.A.601, 1077. All materials or packages which the examining officer considered improper were taken from the visitor and retained on the first floor of the institution. J.A.142, 1077-1078, 1080. No food was permitted in the visiting rooms. J.A.142, 144, 838.

[22]The government, Pet.Br.72, n.54, refers to its expert's partial answer to the question of whether an inmate "could feasibly or with any frequency secrete contraband in the recum [*sic*] or something like that." The complete answer was "Absolutely. I know of cases where it has happened. It does not stop, your Honor, and would not stop somebody swallowing something, whether it passed in a balloon and swallowed something in a balloon and then passing it later, when they get back in the unit." A.71.

[23]In only one instance was something found in an inmate's vagina. A.74. Other instances of discovering smuggled contraband were unrelated to the use of body cavities.



Before entering the visiting room, the inmate was also searched, A.57-58; see also J.A.144 para. 2F (Exhibit C to Warden Taylor's affidavit of January 19, 1976); and the glass-enclosed visiting room was under the constant observation of a correctional officer. J.A.144, 1208-1209. The officer was also empowered to control the number of people in the visiting room at any time. J.A.1209.

All visiting room lavatories were locked, detainees were not permitted to use them, and visitors who wished to do so had to request the key. Pet.App.12a n.10; A.93; J.A.143. At the time of trial, a window was also installed in each lavatory door to permit the visiting room officer to keep under observation the lavatory interior. J.A.1210. Detainees were attired in brightly colored, long-sleeved, one-piece jumpsuits. J.A.528; see J.A.760. Removal of the jumpsuit, at least from the torso, would be required in order to insert anything into the rectum or the vagina. See J.A.925; A.45. Finally, the government's own witnesses testified that urine tests now administered at the MCC would deter the use of drugs, and therefore the importation of narcotics into the institution. A.85.

The district court found the strip search procedure to be "unpleasant, embarrassing, and humiliating," and that requiring an inmate to lift his genitals and spread his buttocks gave rise to a feeling of "deep degradation." Pet.App.149a. The court specifically credited the testimony that MCC guards made physical threats and that the search procedure was so intimidating to inmates as to deter visiting. *Id.* The court noted that the dearth of contraband discovered by anal inspections was no surprise, since an item actually inserted beyond

the anal sphincter muscle would be undetectable by visual inspection. Pet.App.150a. Concluding that the use of metal detectors would deter the introduction of metal objects and that the strip search would do the same for other items, the court found the government's security interests to be amply satisfied by a strip search without the anal and genital inspection. Pet.App.151a-153a.[24]

The court of appeals affirmed, stating that "the gross violation of personal privacy" inflicted by the anal and genital inspection was not outweighed by an "interest in maintaining a practice of so little actual utility." On these facts, it found the cavity inspection "to shock one's conscience." Pet.App.30a.

### D. Cell Searches Conducted in the Detainee's Absence

MCC inmates were subjected to unannounced, random, and frequent cell searches by correctional officers. These searches were of two types: formal unit shakedowns and informal searches of a single cell. During formal searches, a group of cells was cordoned off, cleared of inmates, and each cell was searched thoroughly by a "unit" of correctional officers. Inmates were prohibited from observing them. During informal, single cell searches, the inmate, at the discretion of the officer, could be permitted to observe, but such permission was rare. A.39, 54, 62; J.A.584, 1240, 1241; Pet.App.154a.

[24]The opportunity to conduct cavity inspections is nonetheless still available on the finding by a correctional officer that there is probable cause to conduct such a search. Pet.App.153a.



Although the correctional officers were instructed to leave the searched cells in proper order, A.66, this directive was frequently violated. Guards often left inmates' personal belongings "in disarray," with, as a correctional officer himself testified, "personal property and bedding scattered over the room." Pet.App. 154a; A.62. Not only did inmates find their cells disturbed, but frequently personal items were missing. A.42, 43, 55. The respondents' correctional experts[25] emphasized that permitting the inmate to view searches of his cell would reduce the probability of improper behavior on the part of a correctional officer and that unobserved searches are a source of tension and hostility among inmates. A.46-47, 63-64.

The government's defenses of the regulation were that if a detainee were permitted to observe, he would distract the officers, move contraband, or perhaps become argumentative. A.66. But these claims did not comport with the government's own experience when officers permitted inmates to observe searches, during which there were no reported instances of interference or disturbance, or with the view of one of its experts, who thought inmates should be allowed to watch unless there was some real reason to believe they would be explosive. A.72-73.

The district court credited respondents' evidence that guards frequently left inmates' possessions in disarray after searches and that the search procedure was a source of tension and hostility which would be

[25]Among these experts was David Fogel, former Commissioner of Corrections for the State of Minnesota, who received his doctorate in criminology from the University of California at Berkeley and was a worker with juveniles in detention facilities in Marin County, California. Tr.1647-1648.

ameliorated by giving inmates the opportunity to observe cell searches. Pet.App.154a-155a. The court also found that movement of contraband could easily be prevented by officers on the scene and that the fear of threats or arguments could be remedied simply by removing an argumentative inmate. On this record, the court found that the government's security concerns were not sufficient to justify its prohibition on observation of a cell search by a well-behaved detainee from a reasonable distance. Pet.App.155a-156a.

The court of appeals affirmed, for the reasons stated by the district court.

### E. Prohibition on Receipt of all Personal Property

The inmates of the MCC were not permitted to bring or receive packages, including food or personal effects, from outside the institution, except for a single food package at Christmas. A.25, 95. Detainees were permitted to possess no property other than that furnished by the institution, purchased at the MCC commissary, or purchased through "approved" channels. A.94.

While the MCC does maintain a commissary, inmates were not allowed to visit it. They could, once a week, request items by completing an order form. A.28, 96. Detainees could spend $15 per week, or up to $50 monthly, on available commissary items. A.95; J.A. 525.[26] Those who could afford to might obtain from the commissary cigarettes and tobacco, snack food, coffee, cosmetic items, radios and batteries, watches, and sweatsuits. A.28-29.

[26]There were frequent shortages in items listed on the order forms. J.A.935; Tr.612-613.



The evidence at trial demonstrated that the few items of property an inmate may possess while incarcerated are of the greatest importance to him and that the total restriction on the receipt of packages was a serious deprivation. A.73, 60, 47. Indeed, in the district court, the government conceded that its restrictions on receipt of packages constituted a punitive device for convicted inmates. Pet.App.165a-166a.

The MCC's restrictions on packages were far more severe than those imposed at some institutions, including maximum security institutions for convicted persons. For example, New York State permits its prisoners to receive a monthly package of food in addition to clothing and magazines. A.55; Pet.App. 163a.

In the district court, the government suggested several grounds for its regulations. Thus, the warden asserted that the blanket prohibition upon receipt of packages was necessary to narrow the gap between the "haves" and the "have nots" and to prevent problems of gambling, purchase of favors, and strong-arming. A.67-68, 85. It was also asserted that receipt of packages would cause sanitation and storage problems, and that the rules were required to prevent introduction of contraband. A.67, 80, 85.

The district court found these concerns belied "by experience or by [the government's] own self-contradictions." Pet.App.162a. The assertion that the limited introduction of packages would create problems of strong-arming was inconsistent with the government's sale to inmates through the commissary of "items of substantial cost—*e.g.*, $18 sneakers and $27 radios." The asserted storage problem caused by packages was

inconsistent with the institution's purveying of food from the commissary. The claim that a total ban on packages was necessary to avoid problems of smuggling was belied both by the existence of less restrictive regulations at maximum security institutions and the lack of any explanation as to why protective measures familiar in those institutions and at the MCC could not be used. Pet.App.163a-165a.

The court of appeals affirmed, pointing out that the court order did no more than require the institution to devise reasonable regulations, preserving the institution's right to regulate the dollar value of goods and the number of packages received in the institution. Pet.App.33a.

**F. The "Publisher Only" Rule**

The government enforced a rule at the MCC which prohibited an inmate from receiving from anyone but the publisher or a book club hard or soft cover books, magazines, newspapers,[27] or other printed material. The government asserted that security considerations justified this "publisher only" rule. A.24 para 10. However, it failed to offer evidence of difficulties with the admission of reading matter at other institutions where the "publisher only" rule has been eliminated; nor did it explain why regulations more narrowly tailored would not suffice.

Finding that the publisher only rule implicated rights protected by the First Amendment, and, with respect to indigents, under the Fifth Amendment, the court

[27]Newspapers were available at the MCC only by purchase from a prison vendor. S.A.29 para. 19. However, there were too few copies to meet the inmate demand. A.54.



concluded that the generalized security claim postured by the government did not outweigh the "high constitutional interests here at stake." Pet.App.215a.[28] However, the order did not disturb the institution's right to search those books allowed into the institution. Pet.App.72a.

The court of appeals agreed with the district court that "[t]he 'publisher only' rule severely and impermissibly restricts the reading material available to inmates." Pet.App.26a. The court further noted that many books desired by inmates were not available, either in the library or from the publisher, and stated that it "is inconceivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles." Pet.App.26a-27a.

In its brief to the Court, the government has advised that, following the decisions of the courts below—indeed, five days before the certiorari petition was filed—the Bureau of Prisons regulation was modified to permit books from bookstores, and that it is now "in the process" of modifying the rule to permit receipt of paperback books and magazines from any source. Pet.Br.66 n.49, 69 n.51. The government now asks the Court to review only that portion of the district court order requiring the institution to permit receipt of **hardbound books. Pet.Br.69. However, at no time has** the government moved in the district court for a modification of that court's order.

[28]In so holding, the court rejected the government's position that existence of a prison library obviated the need for relief. Pet.App.216a. As the court was aware, the general library at the MCC is not accessible to detainees; inmates must submit a written request for a book, and then must wait to receive it. S.A.28 para. 13.

## SUMMARY OF ARGUMENT

It is fundamental to the Anglo-American tradition of criminal justice that an individual accused of crime is presumed innocent until proven guilty and may not be punished unless first convicted of a crime. Accused persons who are detained, in lieu of bail or other conditions of pretrial release, for the purpose of assuring their presence at trial, do not, by the fact of their confinement, become proper subjects for punishment.

This principle has unfortunately not been reflected in the practice of pretrial detention in this country. Detainees have been subjected to conditions of confinement much harsher and more restrictive than necessary to accomplish the purpose of assuring their presence at trial and the safe maintenance of the jail. Since the abandonment of the "hands off" doctrine, the federal courts, in considering the conditions of pretrial confinement, have articulated the principle that restrictions on the rights of pretrial detainees must be no greater than necessary to accomplish the purpose of ensuring the detainees' appearance at trial and the collateral purpose of safe maintenance of the jail. Restrictions not necessary for these purposes are inconsistent with the fundamental right not to be punished without a criminal conviction, and therefore must be justified as necessary to some other compelling interest of government. Any restriction on a substantial right not sustainable at this level of justification is an aggravation of the already severe deprivations of liberty inherent in incarceration and renders that restriction punitive in law.



The overcrowding of the Metropolitan Correctional Center by forced double occupancy of single-person cells, enjoined by the courts below, is justified by the government solely on grounds of economy and administrative convenience. However, these factors by themselves are not sufficient to justify serious restrictions on constitutional rights. The record shows that this double-celling was in direct contravention of the intent, design, and construction of the MCC, each of whose cells was purposefully built for the confinement of a single individual. The consequences of double-celling included overcrowding which led to a severe denial of privacy, dignity, and personal security when the occupants were in the cell. Moreover, this additional population in excess of the single-cell capacity of the housing units overburdened the common facilities planned and constructed for each unit, with oppressive consequences for the quality of life of the occupants, rendering unworkable the institution's "modular confinement" system, which was based on the premise that all inmate services and activities should be provided in the housing unit. The cumulative effect of this overcrowding and its consequences was a denial of the presumptively innocent detainees' fundamental right to privacy as well as their fundamental right not to be subjected to punishment in the absence of a criminal conviction. On this record, then, the government's failure to justify its overcrowding of the jail on any ground other than economy and convenience renders the double-celling of detainees punitive in effect.

Moreover, the argument of cost and inconvenience of housing detainees consistent with the government's

own plans for the MCC fails even on its own terms, since the government has been in compliance with the lower courts' rulings on double-celling since their effective date in March 1977 and has never made any showing that court schedules have been disrupted, that new facilities have been required, or that any other major expense or disruption has resulted from the prohibition on double-celling. Thus, even if the Court were to accept the government's position that only the "enhanced scrutiny" test articulated in *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), need be met, the insubstantiality of the cost and convenience argument, as well as the absence of any other justification, falls far short of that standard as well as the more frequently used "compelling interest" standard.

The four other practices before the Court—routine and baseless anal and genital cavity inspections after all visits, the exclusion of detainees from observation of searches of their cells, the total prohibition on receipt of property from outside the institution, and the "publisher only" rule—are each defended on claimed grounds of institutional security. The government asserts, based on the Court's decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977), that the courts below should have granted to the opinions of jail administrators a degree of deference so extreme as to amount to a resurrection of the discredited "hands off" doctrine. However, *Jones* is inapposite to this case, both because the present respondents are pretrial detainees entitled to protections not available to convicted persons, and because the extreme danger of concerted activity by prisoners—the basis of the Court's concern in *Jones*—is not



implicated by any of the challenged rulings of the court below. Further, the courts below gave due deference to the opinions of the jail's administrators except where substantial evidence showed that extreme privations constituted an exaggerated response to claimed prison interests.

The body cavity inspections enjoined below were the most extreme feature of a strip search procedure which was left otherwise undisturbed by the lower courts. After every contact visit, each inmate was forced to disrobe completely in the presence of a guard and, often, other inmates. In addition to inspection of clothing and the requirement that the inmate lift his feet, extend his arms, and open his mouth, inmates of both sexes were compelled to display their anal and genital areas for inspection, a process which was found by the courts below to engender great fear and anxiety in inmates by its very nature and to have been accompanied at times by actual threats of physical abuse by guards. In the absence of cause to believe that a detainee is actually concealing contraband, the courts below concluded that this "gross violation of personal privacy," Pet.App.30a, could not be justified under the Fourth Amendment, even in the context of a jail. This conclusion was based not only on the degrading and intrusive nature of the search, but also on its lack of utility as demonstrated by the record. Given the close surveillance of the visiting arrangements at MCC and the lack of opportunity for prisoners to obtain and conceal contraband, as well as the other rigorous security procedures employed by the institution and unaffected by the orders below, the government's claim of a substantial security interest in this further drastic imposition cannot be credited.

The courts below also enjoined as unreasonable the practice of excluding detainees from observing the random and frequent searches of their cells—searches which involved thorough inspections not only of the room and its fixtures, but also of all personal items and papers of the inmates. During these searches, inmates' belongings were often treated with disrespect and their rooms left in disarray, and as a result of these abuses and the inmates' inability to be present at the searches, inmates feared that personal items would be taken. The district court held that permitting inmates to observe these searches would both allay the inmates' fear and deter the guards from exceeding authorized limits of the search process. The courts further found that the security interests asserted by the government could be adequately served by an order requiring only that the inmate be permitted to watch the search from a reasonable distance and permitting disruptive inmates to be removed from the area entirely.

The total prohibition on receipt of property from outside the institution was justified by the government in terms of security, but the argument ultimately amounted to an unwillingness to take the time to search incoming packages. No reason was offered why limited types and quantities of personal items, subjected to a thorough search, could not be admitted. This sweeping prohibition on the basic right to use and enjoy property was found by the courts below to exceed the government's legitimate interests. Nevertheless, no specific items were required to be admitted; the courts below required merely that the government re-examine its policy and promulgate reasonable regulations, suggesting only that "we are sure that it will not impose draconian limitations." Pet.App.33a.



Finally, the government has advised the Court that its "publisher only" rule is being substantially modified to permit inmates to receive soft-covered books and magazines from any source. It has accordingly informed the Court that only issues relating to hard-cover books remain for decision. The courts below have never been advised of these proposals, and thus have never had an opportunity to consider the appropriateness of modification of the existing order. These substantial changes in circumstances warrant a dismissal of this portion of the writ of certiorari as improvidently granted.

In the event that the Court finds it appropriate to decide the merits of the rule as it existed at the time of trial, the decision below should be affirmed. The prior prohibition on the receipt of any literature from any source other than the publisher was inconsistent with the First Amendment's guarantees of the right to receive information, especially in view of the unavailability of many items in the MCC library and the practical and financial problems of ordering material from publishers. The government's asserted security interest in avoiding the introduction of contraband could be adequately served by inspection of incoming parcels and by reasonable limitations on quantity.

## ARGUMENT

### I

### THE DUE PROCESS CLAUSE REQUIRES THE GOVERNMENT TO JUSTIFY BY COMPELLING NECESSITY ALL SUBSTANTIAL RESTRICTIONS AND PRIVATIONS IMPOSED UPON PRETRIAL DETAINEES.

The law has long acknowledged the limited interest of the government in restricting the liberty of persons detained pending the resolution of criminal charges:

> Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the mittimus of the justice. . . . ; there to abide till delivered by the due course of law. . . . But this imprisonment, as has been said, is only for safe custody, and not for punishment: Therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only. . . . 4 W. Blackstone, COMMENTARIES *300.

Despite this principle, pretrial detainees have generally been subjected to restrictions much more severe than necessary for confinement. National Advisory Commission on Criminal Justice Standards and Goals, CORRECTIONS 101, 273-277 (1973). It was not until the erosion of the "hands off" doctrine[29] of judicial

[29]Recent decisions of the Court establish that there is no longer any "iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974); see also *Procunier v. Martinez*, 416 U.S. 396, 404-406 (1974).



nonintervention in prison matters that significant progress was made toward putting this standard into practice.

From the beginning, the federal district courts held it axiomatic that the detainee could not be punished or subjected to conditions that were, in effect, punitive. Thus, one court observed that punishment of detainees was inconsistent "with the Fourteenth Amendment to the Constitution, which forbids the deprivation of liberty without due process of law. . . . 'Punishment' cannot be justified without a judicially-determined finding of guilt; in other words, pre-trial detainees may not be 'punished' for crimes charged against them but not yet proved against them." *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676, 685-686 (D.Mass. 1973), *affirmed on other grounds*, 494 F.2d 1196 (1st Cir.), *cert. denied* sub nom. *Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974). Therefore, "they are not to be subjected to any hardship except those absolutely requisite for the purpose of confinement only, and they retain all the rights of an ordinary citizen except the right to come and go as they please. . . ." *Jones v. Wittenberg*, 323 F.Supp. 93, 100 (N.D. Ohio 1971), *affirmed on other grounds* sub nom. *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). Detention after a bail hearing to assure presence at trial justifies no restrictions beyond the fact of incarceration. "Subjecting a detainee to gratuitous and wholesale deprivation of rights which are unrelated to insuring his presence at trial offends the requirements of due process of law. . . . Even assuming [that conditions are not cruel and unusual] . . . , jail administrators are not simply free to disregard the fact that

pretrial detainees are not convicted criminals." *Brenneman v. Madigan,* 343 F.Supp. 128, 137, 138 (N.D.Cal. 1972).[30]

This line of analysis has been overwhelmingly applied by the courts of appeals which have reviewed pretrial conditions cases. As Judge Wisdom has said, "[a] government may hold a citizen without showing that he has done wrong, but it may not punish him without proof." *Miller v. Carson,* 563 F.2d 741, 746 (5th Cir. 1977). Where imprisonment is imposed prior to conviction, incarcerating officials conduct only a "temporary holding operation. . . . Punitive measures in such a context are out of harmony with the presumption of innocence." *Anderson v. Nosser,* 438 F.2d 183, 190 (5th Cir. 1971), *reaffirmed on rehearing in pertinent part,* 456 F.2d 835, 841 (5th Cir. *en banc*), *cert. denied* sub nom. *Nosser v. Bradley,* 409 U.S. 848 (1972).[31]

[30]These principles have been consistently applied by the district courts. *E.g., Ahrens v. Thomas,* 434 F.Supp. 873, 897 (W.D.Mo. 1977), *affirmed in pertinent part, reversed on other grounds,* 570 F.2d 286 (8th Cir. 1978); *Dillard v. Pitchess,* 399 F.Supp. 1225, 1232-1233 (C.D.Cal. 1975); *Cudnik v. Kreiger,* 392 F.Supp. 305, 311 (N.D. Ohio 1974); *Wilson v. Beame,* 380 F.Supp. 1232, 1237 (E.D.N.Y. 1974); *Inmates of Milwaukee County Jail v. Peterson,* 353 F.Supp. 1157, 1160 (E.D.Wis. 1973); *Hamilton v. Love,* 328 F.Supp. 1182, 1191-1192 (E.D.Ark. 1971); *Davis v. Lindsay,* 321 F.Supp. 1134, 1139 (S.D.N.Y. 1970); *Seale v. Manson,* 326 F.Supp. 1375, 1379 (D.Conn. 1971); *Tyler v. Ciccone,* 299 F.Supp. 684, 687 (W.D.Mo. 1969).

[31]See also *Norris v. Frame,* Docket No. 78-1090 (3d Cir. Oct. 31, 1978); *Campbell v. McGruder,* 580 F.2d 521 (D.C. Cir. 1978); *Patterson v. Morrissette,* 564 F.2d 1109 (4th Cir. 1977); *Duran v. Elrod,* 542 F.2d 998, 999-1000 (7th Cir. 1976); *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 827 (3d Cir. 1976); *Taylor v. Sterrett,* 532 F.2d 462, 470 n.11 (5th Cir. 1976); *Inmates of San Diego County Jail v. Duffy,* 528 F.2d 954, 957 (9th Cir. 1975); *Detainees of Brooklyn House of*

*(continued)*



These cases do no more than apply the principle, long recognized by the Court, that the accused has a special status based on the due process prohibition on punishment prior to conviction and the presumption of innocence. The principles, like the right to a jury trial and the right to counsel, are "fundamental to the American scheme of justice," *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968), and are "necessary to an Anglo-American regime of ordered liberty." *Id.* at 150 n.14; see also *Gideon v. Wainwright,* 372 U.S. 335, 343-344 (1963). The right to reasonable bail before trial "serves to prevent the infliction of punishment prior to conviction," and "unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle,* 342 U.S. 1, 4 (1951). If, however, the conditions of pretrial release or the amount set as bail cannot be met by the accused and he is held in custody, he may not be treated as if he were convicted. *McGinnis v. Royster,* 410 U.S. 263, 273 (1973);[32] see also *Ingraham v. Wright,* 430 U.S. 651, 671-672 n.40 (1977); *Bounds v. Smith,* 430 U.S. 817, 840 (1977) (Rehnquist, *J.*, dissenting).

*(footnote continued from preceding page)*

*Detention v. Malcolm,* 520 F.2d 392, 397 (2d Cir. 1975); *Rhem v. Malcolm,* 507 F.2d 333, 336 (2d Cir. 1974). The only decision to the contrary is *Feeley v. Sampson,* 570 F.2d 364 (1st Cir. 1978); but see *DiMarzo v. Cahill,* 575 F.2d 15, 20 (1st Cir.), *cert. denied* sub nom. *Hall v. DiMarzo,* 47 U.S.L.W. 3301 (U.S. Oct. 31, 1978).

[32]In *McGinnis v. Royster,* 410 U.S. 263 (1973), the unavailability of rehabilitation programs to the detainee resulted in the denial to him of good time credit against his post-conviction sentence for his period of pretrial incarceration. The Court stated that "it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with the presumption of innocence." 410 U.S. at 273. It would be anomalous to deny the detainee the benefits of post-conviction custody while inflicting upon him its adverse conditions.

The government's assertion that the presumption of innocence merely allocates the burden of proof at trial and has no bearing on confinement conditions, Pet.Br. 38, therefore misapprehends the significance of the presumption. By its rejection of the applicability of the presumption of innocence here, the government implies that it may do more than what is necessary to restrain the accused for purposes of assuring his appearance at trial. Thus, while it rhetorically acknowledges that it may not punish pretrial detainees, Pet.Br.23, 39-40, the government's position permits what is, in effect, punishment to be inflicted unrelated to a finding of guilt. The argument is simply contrary to established principle.[33]

To protect what is "[f]undamental to the Anglo-American jurisprudence of criminal law, . . . that an individual is to be treated as innocent until proven guilty by a jury of his or her peers," Pet.App.11a, the court of appeals examined the government's justification for the practices challenged by respondents. The court reasoned that those limitations on liberty which are inherent in the fact of confinement are justifiable and that because the preservation of the institution's security was integrally related to the safe custody of

[33]The government's sole support for its assertion is dicta in a footnote in *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1080 n.1 (3d Cir. 1976), that the presumption is of no significance for pretrial detention conditions. The above-cited authorities show that the footnote is incorrect because based on too limited a view of the presumption. Further, the Third Circuit has, by implication, rejected the dicta, finding that detainees are entitled to more favorable conditions than those enjoyed by convicted people because detainees may not be punished. *Norris v. Frame, supra*, Docket No. 78-1090, slip op. at 7-8 (3d Cir. Oct 31, 1978).



detainees, some privations were justified as incident to this security interest. There remained "substantial" rights, however, the restriction of which was not inherent in or necessitated by the fact of confinement or the need for security. These substantial rights, said the court of appeals, may be totally denied or restricted only upon a showing that a compelling governmental interest necessitated the limitation. The restriction or condition imposed by the government to protect a compelling interest was required to be related in scope to the interest so as to minimize interference with the substantial right of the detainee. The actual method of regulation was left to the discretion of prison officials, but cost or administrative convenience might not justify a regulation which was overbroad. Pet.App.2a, 11a-13a.

Although the government acknowledges that "there are significant differences . . . between the due process rights of convicted inmates and pre-trial detainees," Pet.Br.16-17, it quarrels with the test utilized by the court below to determine whether a restriction or condition constitutes punishment. Pet.Br.26, 44-46. The government argues that, insofar as certain of the deprivations suffered by respondents involve matters that are not normally viewed as fundamental rights for persons who are not incarcerated, the court below erred in applying a compelling interest standard rather than requiring a mere reasonable relationship. Pet.Br. 44.[34] The government concedes, however, that restric-

[34]The government's reliance on *Jackson v. Indiana*, 406 U.S. 715 (1972), and *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249-250 (1972), is misplaced. Both cases involved required procedural protections, one for commitment to render a person competent to stand trial, the other to determine competency to stand trial. By contrast,

*(continued)*

tions placed on fundamental rights must meet the compelling interest test. Pet.Br.30-31. This argument, however, ignores the nature of the right at issue: the fundamental right of a presumptively innocent detainee not to be punished without first being convicted. It ignores the fact that the detainee, by the mere fact of incarceration, has already been subjected to an abrogation of the ordinary conditions of life. Detention, although intended merely to ensure the detainee's presence for trial, is in fact similar in many of its basic features to what is imposed upon those convicted of crime. To limit this impact, the confinement must be kept strictly within bounds of necessity or the confinement becomes punitive in law.[35] Thus, in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963), the Court stated that a sanction which is justified in nonpunitive terms becomes punitive insofar as it "appears excessive in relation to the alternative purpose assigned. . . ."

Nevertheless, the court of appeals did not, contrary to the government's characterization, Pet.Br.25, 27, 35,

*(footnote continued from preceding page)*
cases dealing with conditions of confinement for those civilly committed have required that only the least restrictive conditions be imposed. See, *e.g., Ashe v. Robinson,* 450 F.2d 681, 685 (D.C. Cir. 1971); *Covington v. Harris,* 419 F.2d 617, 623-4 (D.C. Cir. 1969); *Eubanks v. Clarke,* 434 F.Supp. 1022, 1028 (E.D.Pa. 1977); *Wyatt v. Stickney,* 344 F.Supp. 387, 396 (M.D.Ala. 1971), *affirmed in relevant part, remanded in part, reversed in part* sub nom. *Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974); *In re Jones,* 338 F.Supp. 428, 429 (D.D.C. 1972).

[35]People who are ultimately acquitted of the criminal charges against them can never be made whole with respect to the consequences of custody. Therefore, if the presumption of innocence means anything, it must necessitate the minimization of hardships caused by confinement.



39, 40, 46, require all privations to be justified by a compelling interest; only those that are "substantial" must be so justified. Pet.App.2a.[36] This limitation is significant and meaningful and protects jail administrators from having to defend every detail of institutional routine at this level of constitutional scrutiny. Thus, the court of appeals found insubstantial the right of visitors to have access to unlocked lavatories and the rights of detainees to possess typewriters and to be attired in clothing other than the institution's one-piece jumpsuits. Pet.App.15a, 33a, 34a.[37] The court of appeals was extremely selective in applying the compelling interest test, reserving it for what were substantial, if not fundamental, deprivations of liberty[38]—anal and genital cavity inspections and unobserved room searches implicating the Fourth Amendment requirement of reasonableness; the "draconian" restrictions on personal property and the severe infringement on privacy and dignity due to overcrowding implicating the Fifth Amendment; and the

[36]The government's professed fear of the "broad sweep" of the court of appeals' standard rests on its failure to acknowledge this "substantiality" limitation.

[37]The government's belief that the court of appeals' approval of the ban on typewriters implies that the compelling interest standard is not "to be applied vigorously," Pet.Br.40 n.32, again reflects its misapprehension of the substantiality standard.

[38]The issues presented by this case do not require the Court to define with precision the line between those claims which involve substantial constitutional rights and those which do not, since the questions presented to the Court clearly involve substantial rights.

limitations caused by the "publisher only" rule implicating the First Amendment.[39]

## II

## OVERCROWDING BY DOUBLE-CELLING AT THE MCC IS VIOLATIVE OF THE DUE PROCESS CLAUSE.

The court of appeals agreed with the district court, Pet.App.17a-19a, that, based on an appraisal of the totality of the conditions at the MCC, forced double occupancy of cells caused overcrowding and fundamental denials of decency, privacy, personal security, and, simply, "civilized humanity." Pet.App.211a. The absence of any substantial justification, Pet.App.19a, for the overcrowding resulted in conditions which were, in effect, punishment, and constituted a violation of the Due Process clause.

It was undisputed that the cells at the institution were explicitly designed and constructed for only one person each. As Paul Silver, the MCC architect, testified, "to try to convert [a cell] into a two-person room [is] a clear violation of the capability of that space." A.9. The

[39]The government presentation acknowledges that pretrial detainees may possess rights that are "deeply rooted in this Nation's history and tradition," Pet.Br.34, that even if not fundamental, restrictions imposed upon them should be examined with enhanced scrutiny under the due process clause. Pet.Br.34-35. The government agrees that rights to privacy and dignity may be included in this category. See *infra* at 46-47. In this section of our brief, we have examined the constitutional significance of the presumptively innocent detainee's right not to be punished prior to conviction. The history of that right shows that it is basic to our tradition and jurisprudence, and *a fortiori* protected from unnecessary infringements by the enhanced scrutiny doctrine.



effects of this violation were catalogued by the district judge on his tour and are readily apparent from an inspection of the architectural plans and the gross physical features of the rooms.

Because the MCC cells are approximately 75 square feet in area, double-celling provides only 37.5 square feet per person, an amount of space which numerous courts have found to be inadequate to provide minimal privacy and space for a prisoner, whether convicted or a detainee.[40]

Standards promulgated by organizations concerned with corrections and the management of prisons have also universally condemned housing as confined as the double-occupied MCC cells.[41] The Government itself

[40]*Campbell v. McGruder*, 580 F.2d 521, 537 and n.29 (D.C. Cir. 1978) (48 square feet per inmate required); *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (60 square feet per inmate); *Chapman v. Rhodes*, 434 F.Supp. 1007, 1021 (S.D. Ohio 1977) (on the facts, prohibited double-celling of convicted inmates in 60 square feet in a new penitentiary); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676, 690 (D.Mass. 1973), *affirmed as to remedy*, 494 F.2d 1196 (1st Cir.), *cert. denied* sub nom. *Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974), *reaffirmed as to remedy*, 518 F.2d 1241 (1st Cir. 1975) (88 square feet).

[41]American Public Health Association, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 62 (1976) (60 square feet per person); American Correctional Association, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 4142 (1977) (one inmate per cell with at least 60 square feet of cell space if inmates are locked in less than 10 hours per day; at least 80 square feet if they are locked in more than 10 hours per day); National Sheriffs' Association, A HANDBOOK ON JAIL ARCHITECTURE 63 (1975) (70 to 80 square feet for single room occupancy); National Clearinghouse for Criminal Justice (70 square feet); cited in *Battle v. Anderson*, 564 F.2d 388, 395 (8th Cir. 1977); National Advisory Commission for Criminal Justice Standards and Goals, CORRECTIONS, Standard 11.1 at 358 (1973) (80 square feet); United Nations Congress on the Prevention of Crime and the

*(continued)*

has consistently opposed the housing of two people in an area as small as MCC cells.[42] As the judge observed, in a cell of this size, there is no room for two people to walk about. The presence of a bed, a sink, a toilet, a desk, and two chairs leaves only a narrow aisle for movement, requiring that each detainee stay within a few feet of the other in "unwanted intimacy" when both are in the cell. Pet.App.206a. Jutting into the middle of the room is an uncovered toilet, a "stark centerpiece," Pet.App.211a. During lock-in hours, an inmate need-

*(footnote continued from preceding page)*
Treatment of Offenders, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS AND RELATED RECOMMENDATIONS §9(1) (1955) (single cell occupancy recommended).

[42]The Chief of Facilities Development for the Federal Bureau of Prisons said that without 50 square feet of space, excluding the space occupied by furniture, in which an inmate might move about, the cell cannot be considered safe, fit for habitation, or conducive to achieving penological goals. *Campbell v. McGruder*, 580 F.2d 521, 537 n.29 (D.C.Cir. 1978). Five years before the MCC opened, the Federal Bureau of Prisons warned that when double-celling is allowed to exist, "both the facility and the personnel are overworked and minimum standards cannot be met." United States Bureau of Prisons, THE JAIL: ITS OPERATION AND MANAGEMENT 102 (1970). The active participation of the Bureau in the drafting of the 1966 American Correctional Association Standards, which prohibited double-celling and which require at least 50 square feet of living space per inmate, has been noted by courts. See *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F.2d 392, 396 n.5 (2d Cir. 1975).

In its draft standards, the Department calls for single cells of at least 60 square feet (70 square feet where detainees spend more than 10 hours per day in the cell). United States Department of Justice, DRAFT FEDERAL STANDARDS FOR CORRECTIONS, Standard 004 at 10 (1978). While the government attempts to disclaim the Draft Standards on grounds that they do not set constitutional minima, Pet.Br.54-55 n.43, the standards are intended "to provide guidelines for the decent and humane operation of our country's corrections and detention facilities." Introduction to DRAFT FEDERAL STANDARDS at 2.



ing to urinate or defecate was required to do so within a few feet of his cellmate, Pet.App.206a, and the other was forced to endure any "foul odors." Pet.App.211a.[43]

Quite apart from the lack of space, the shape and construction of the cell—designed for one person—created actual physical discomfort when more than one inmate was placed in it. To accommodate a second person, the institution installed bunk beds. When the bed was placed against one wall, the vent blew air about a foot above the person in the upper bunk so that the detainee sleeping there could not sit up in bed, lift his legs, or rest or sleep on his side without exposure to the cold air. To avoid this result, inmates blocked the vents, interfering with proper ventilation and making the cells "musty and unpleasant" smelling. Pet.App. 206a-207a. (The alternative arrangement—placing the bed against the opposite wall—would not only have resulted in the bed's blocking the window, but would have placed it only inches from the open toilet.)

The conversion to a double bunk required removal of the clothing storage drawer from beneath the original single bed. Only one drawer was left in the cell, and frequently no drawer was allowed to remain, denying the inmates any place to keep their clothing; shelf space was rendered inadequate for toilet articles and other items.

[43]The impact of this denial of privacy with respect to bodily functions is widely acknowledged:

> [S]ocial systems have given symbolic importance to certain conventionally designated areas of privacy. Thus in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem. Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968).

Inmates were assigned to cells without consideration of age, physical or emotional health, psychological condition, or level of aggressiveness, and initial cell assignments were made without any information about the inmate.[44] Thus, the court also found that double-celling threatened "personal security." Pet.App.211a.[45]

The court's decision rested not only on its finding that the rights of privacy, dignity, and personal safety were violated by these conditions, but also on the obvious fact that overcrowding impaired the functioning of the multipurpose rooms—the keystone to the operation of the modular unit system. The court concluded, not surprisingly, that those areas in which the inmates engaged in all indoor recreational and group social, educational, and religious activities because of the absence of central facilities were rendered "congested, noisy, and unworkable for their intended uses." Pet.App.207a; see Pet.App.18a. Three pieces of exercise equipment could not support the needs of a population grown beyond its intended size.

[44]The government itself has recognized the danger of indiscriminately housing inmates together:

> The facility classification committee should carefully evaluate each inmate before assigning him/her to a multiple occupancy cell for the purpose of ensuring the protection of the individual being assigned as well as the protection of the other inmate(s) already assigned to the cell. DRAFT FEDERAL STANDARDS FOR CORRECTIONS, Standard 005 discussion at 10.

[45]The judge's finding that personal security was threatened was supported by uncontradicted evidence produced at later proceedings. On the night-time shifts, only one officer was assigned to cover the two units on a floor. The only way to attract the guard's attention from inside the locked cell was to bang on the door; often, half an hour passed before the guard responded. Tr. 1033-34, 1154-55; see J.A. 621; Pet.App.179a.



There were too few chairs and tables for all inmates to eat their meals in the multipurpose rooms, and for meals inmates would have to return to the cells, with their open toilets and often only one chair. Pet.App. 207a. The judge found that the effect of overcrowding on the multipurpose rooms compounded the regime of idleness. Pet.App.209a.

Based on these uncontroverted facts, supplied largely by the government itself,[46] and the visit, the court found that there appeared no genuine disputes as to material facts preventing a decision on a motion for summary judgment, Pet.App.203a, and concluded that, "taking all the facts together," double-celling at the MCC was unconstitutional. Pet.App.207a.

The government's assertion, Pet.Br.50-53, that the Menninger affidavit created triable issues of fact is untenable. The court assumed the truthfulness of the factual assertions in the affidavit, but concluded that they were offset by other indisputable facts. Pet.App. 208a-209a. Dr. Menninger's failure to observe actual psychiatric destruction or evidence of aggressive or deviant sexual behavior at the MCC[47] might be

[46]The court had before it the admissions in the return to the amended petition; two of Warden Taylor's affidavits dated October 19, 1976, A.21-27, and December 29, 1976, A.33-35; the government's statement pursuant to Local Rule 9(g), United States District Court, Southern District of New York, listing the relevant undisputed facts (S.A.); and the architectural plans of the institution, attached as Exhibit 1 to the 9(g) statement.

[47]Later at trial, the government's own experts testified that overcrowding had an adverse effect on the population. Norman Carlson, Director of the Bureau of Prisons, testified that overcrowding increases tensions and is a factor in prison violence. J.A.1693-1694. Even Dr. Menninger admitted that overcrowding causes stress. Tr.2754. The former warden of the Federal Detention Headquarters at

*(continued)*

material if respondents were convicts entitled only to the protection of the Eighth Amendment's prohibition on cruel and unusual punishment. Where pretrial detainees are involved, however, Eighth Amendment scrutiny is inappropriate, see *Ingraham v. Wright, supra,* 430 U.S. at 671 n.40, and the absence of extreme psychological damage is simply not material. As the district court observed in another context, "constitutional injury may occur short of emotional trauma leaving scars or requiring treatment." Pet.App.150a.

The court of appeals agreed with the district court, concluding that "infringements on privacy and personal dignity," Pet.App.18a, caused by double-celling in light of the government's failure "to show any substantial justification for [it]," Pet.App.19a, were "so 'dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainee's due process and equal protection rights.' " Pet.App.17a.

The government concedes that the implicated privacy right represents an aspect of individual liberty that it "would not denigrate." Pet.Br.48. It further acknowledges that "the interest in privacy and human dignity implicated by housing pretrial detainees . . . in relatively confined, non-private quarters" may be among "a narrow category of interests" which the Court may conclude are not fundamental but "are so profoundly anchored in the traditions of our society that their restrictions must be examined with particular care by

*(footnote continued from preceding page)*
West Street, Louis Gengler, gave virtually identical testimony when he testified in *Detainees of Brooklyn House of Detention v. Malcolm,* 520 F.2d 392, 396 n.4 (2d Cir. 1975).



the courts. . . ." Pet.Br.48.[48] This concession would be well taken, even if the government's contention were correct that the right involved is solely one of "literal, physical separation of individuals. . . ." Pet.Br.46-47.[49] However, the government refuses to acknowledge that what is at issue is far more than double-celling *per se,* but includes the overall consequences to detainees who are housed at the jail. As the district judge concluded, not only did double-celling cause qualities of "threat, nausea and degradation, . . . social stigma and humiliation," Pet.App.211a, but basic environmental conditions were distorted by overcrowding. This uninterrupted intrusion and perversion of facilities is a far more serious infringement on dignity than is conveyed by the government's characterization of housing in relatively confined non-private quarters. Thus, on the record made in the district court, the government's practices at the jail violate both the fundamental right

[48]In light of the government's concession that the intrusion upon the privacy and dignity interest of the detainees might deserve enhanced scrutiny, the government's position that the Eighth Amendment standard should have been applied here to deny relief, Pet.Br.54 n.42, creates an inconsistency explicable only by its inability to justify the overcrowding. Furthermore, the government's reference to *Feeley v. Sampson,* 570 F.2d 364 (1st Cir. 1978); *Loe v. Armistead,* 582 F.2d 1291 (4th Cir. 1978); *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077 (3d Cir. 1976); and *Duran v. Elrod,* 542 F.2d 998, 999-1000 (7th Cir. 1976), as authority for the applicability of the Eighth Amendment standard, Pet.Br.24, 54 n.42, is at odds with the later concession that these cases find greater rights belonging to detainees. Pet.Br.56.

[49]Even if separateness were the issue, the absence of a precedent of the Court identifying it as part of the right to privacy for pretrial detainees is of no significance, for the issue has not previously been considered. See, *e.g., Moore v. City of East Cleveland,* 431 U.S. 494, 500-501 (1977) (where the Court gave initial consideration to the extended family concept).

of privacy and dignity and the equally fundamental right of presumptively innocent detainees not to be subject to conditions so harsh as to constitute punishment.

Even accepting the government's suggestion that only the enhanced scrutiny test of *Moore v. City of East Cleveland,* 431 U.S. 494, 500-503 (1977), might be applicable, Pet.Br.48, the court of appeals decision is easily sustainable. The plurality opinion in *Moore* states that the full scope of the liberty guaranteed by due process is a "rational continuum" which includes a freedom from substantial arbitrary impositions, and requires that the reasons given for abridgement of certain interests be "carefully scrutinized." 431 U.S. at 502.

In this case, the sole reason given for the intrusion on the rights of privacy and decency by overcrowding is fiscal and administrative concerns. Pet.Br.42, 48, 49. However, it is axiomatic that "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them," *Watson v. City of Memphis,* 373 U.S. 526, 537 (1963), or that a denial of rights "may be more convenient for jail administrators." *Estelle v. Williams,* 425 U.S. 501, 505 (1976). When asserted as the sole justification for an infringement of constitutional rights, cost and administrative convenience have repeatedly been rejected. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 647 (1974); *Vlandis v. Kline,* 412 U.S. 441, 451-452 (1973); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972); *Bell v. Burson,* 402 U.S. 535, 540-541 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 265-266 (1969). Claims of cost and inconvenience asserted



as the sole justification for a governmental practice have generally prevailed only in cases involving the minimal scrutiny or "rational basis" test applied to social and economic legislation under equal protection analysis. See, *e.g., Weinberger v. Salfi,* 422 U.S. 749, 776-780 (1975).[50] Cost and convenience, when asserted as the sole justification for infringement of constitutionally protected interests, are *a fortiori* inadequate when alternative means are available to meet the government's objectives at minimal cost and inconvenience. Thus, in *Vlandis v. Kline, supra,* the Court, citing the procedures created administratively after the district court's action in that case, noted that a state was able to establish reasonable criteria for determining bona fide in-state residency without resort to the irrebuttable presumption of non-residency it had initially established. 412 U.S. at 453-454. See also *Goldberg v. Kelly, supra,* 397 U.S. at 265-266. Here, similarly, as the court of appeals found, Pet.App.19a, the government complied with the order to cease double-celling by eliminating the "cadre." Indeed, after

[50]Even if the rights asserted by respondents are entitled only to the protection of the enhanced scrutiny test, see *Moore v. City of East Cleveland, supra,* they are accorded greater protection than that afforded by minimal rationality. The closest analogy in equal protection analysis involves cases of gender-based discrimination, which utilize a standard of governmental justification more exacting than minimal rationality. *Reed v. Reed,* 404 U.S. 71 (1971). Whether this standard is viewed as a "middle tier" approach or a more critical application of the "rational basis" test is immaterial. See *Craig v. Boren,* 429 U.S. 190, 210-211n. (1976) (Powell, J., concurring). These cases "have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Id.* at 198; see also *Califano v. Goldfarb,* 430 U.S. 199, 205 (1977); *Frontiero v. Richardson,* 411 U.S. 677, 690-691 (1973).

entry of the district court order, the government advised the court that it could comply within 60 days by the normal expiration of sentences of "cadre" members, J.A.3043, the 103 sentenced inmates retained at the institution for the purpose of performing certain jobs.[51] All but 21 of the "cadre" were transferred to other facilities, and detainees and inmates held on writs of habeas corpus performed the jobs "cadre" members had previously done. Pet.App.19a.

The government never sought from the district court a stay of the order prohibiting double-celling, and the order has been in effect since March 1977—almost two years. Furthermore, the district court order, as modified by the court of appeals, ending overcrowding in the dormitories and terminating housing in balconies and common areas has been in effect since August 28, 1978, and the government has not made use of that part of the order which permits double-celling for up to 10 days on an emergency basis. Pet.App.51a. During this entire period, the government has never made a showing that it was not able to produce detainees for court appearances or that additional facilities would need to be constructed as a result of the court order.

In view of the government's compliance with the order below and the absence of any showing of any serious expense or disruption resulting therefrom, the government's claims of excessive costs and inconvenience are open to question. Moreover, it was the government itself that chose to plan and build a pretrial facility

[51]Since these inmates were not involved in judicial proceedings, but were retained at the MCC at the government's request, they could be removed from the institution for service of their sentences at other institutions.



based on the modular system intended for a population of a specific size. The articulated plan was to humanize staff-inmate relations and to afford inmates greater privacy and freedom than jails of earlier construction. Pet.App.5a. The government's claim of a substantial administrative interest in its *ad hoc* departure from its own carefully considered prescriptions for administration of the MCC cannot prevail in the face of the substantial rights asserted by respondents, the findings of the courts below, and the extensive record upon which they relied.

## III

## THE RECORD ESTABLISHES THAT THE RESTRICTIONS LIMITING RIGHTS OF DETAINEES AT THE MCC WERE GREATER THAN NECESSARY TO SATISFY THE GOVERNMENT'S SECURITY INTEREST.

The government, despite extensive safeguards to prevent contraband from entering the prison, conducted visual anal and genital inspections of inmates after every contact visit and prevented detainees from observing the thorough searches of their cells and all belongings, including legal papers. Further, the government imposed an absolute prohibition on receipt, possession, and use of all personal property from outside the institution and prevented respondents from receiving books and other printed materials from sources other than the publisher. See *infra* at 54ff. To determine the constitutionality of each regulation or

procedure, the courts below examined the affected constitutional right, the governmental interest in security, and the extent of the privation. As to each of the four listed matters, the only ones raised by the government here,[52] the privation was found by the courts below to be so broad as to exceed what was justified.

Relying on *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), the government asserts that insufficient deference was given to the opinions of its witnesses and that there was no substantial evidence to indicate "that the 'officials [had] exaggerated their response' to the security risks. . . ." Pet.Br.58-59. Examination of the government's brief in the context of this record demonstrates that the government seeks to imbue a claim of security with talismanic significance such that its mere assertion invokes an extraordinary degree of deference. In effect, the government advocates a return to the judicial "hands off" doctrine.

The government's substantial reliance on *Jones* is inappropriate because the Court, in *Jones,* was not required to examine the rights of pretrial detainees. In that case, the particular and restrictive circumstances of the penal confinement of those "who have been found to have violated one or more of the criminal laws," *id.*, 433 U.S. at 129, was of concern. Not only is the status of the prisoners here different from that involved in *Jones,* but the rights, too, are radically different. *Jones* concerned an inmate labor union, the purpose of which was to engage in collective action to

[52]Overcrowding is not discussed in this section because no security interest is raised by the government to justify it. Pet.Br.46.



advance the interests of convicts *vis-a-vis* correctional officials. By contrast, the rights involved here do not raise the specter of mass action within the institution. Compare *Procunier v. Martinez,* 416 U.S. 396, 420-422 (1974); *Johnson v. Avery,* 393 U.S. 483, 486-487 (1969); *Ex parte Hull,* 312 U.S. 546 (1941). They are entirely personal and individual rights, each of which is protected by a specific constitutional provision.

In any case, the courts below accorded due deference to the opinions of jail officials, as *Jones* suggests.[53] After consideration of the substantial evidence in the record that government regulations asserted to aid security frequently were far broader than the interest required, the courts below responded to protect constitutional rights only by limiting the privations which were the most restrictive.[54] A specific discussion of the issues follows.

[53]For example, the district court deferred to the government's decision not to use a central gymnasium, to require clergymen to conduct religious services in each unit rather than a central chapel, to prohibit movement to the general library and the commissary, and to use correctional officers of one sex to guard inmates of the opposite sex. Pet.App.98a, 100a, 108a, 111a, 183a.

[54]We would also note that to the extent the Court was concerned with a problem of federalism in *Jones*, that concern is not a factor here. Indeed, a federal court's concern with the very jail housing federal prisoners is appropriate. See *Wayne County Jail Inmates v. Wayne County Board of Commissioners,* Civ. Action No. 173217, Opinion on Motion for New Trial and Motion to Amend Judgment (Cir. Ct., Wayne County, Michigan, July 28, 1978) at 24.

**A. Visual inspections of the anal and genital cavities were humiliating and of little utility, and are therefore unreasonable on this record under the Fourth Amendment.**

Detainees, as well as convicted inmates, retain the Fourth Amendment protection requiring that searches of person or property be reasonable under the circumstances of imprisonment. *United States v. Lilly,* 576 F.2d 1240 (5th Cir. 1978); *Bonner v. Coughlin,* 517 F.2d 1311, 1316-1317 (7th Cir. 1975) (Stevens, *J.*), *affirmed in relevant part on rehearing,* 545 F.2d 565 (7th Cir. 1976 *en banc*), *cert. denied,* 98 S.Ct. 1507 (1978); *United States v. Savage,* 482 F.2d 1371, 1372 (9th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974); *Frazier v. Ward,* 426 F.Supp. 1354, 1366 (N.D.N.Y. 1977); see *Houchins v. KQED, Inc.,* 98 S.Ct. 2588, 2592 n.2 (1978). Here, the government concedes, as it must, that the anal and genital cavity inspection and the search procedure of which it is a part, conducted after each contact visit, implicate "notions of personal dignity and decency." Pet.Br.74. Further, the government acknowledges that the determination of whether a search is constitutionally reasonable requires attention to the total setting of the search, for if the institution's security needs can be met by a significantly less obtrusive measure than those in effect, it may be unreasonable to impose the greater restriction. Pet.Br. 74. The district judge, based on these conceded principles, found the body cavity inspections as used in circumstances at the jail to constitute "extreme measures of indignity" which were unreasonable and shocking. Thus, sustaining all the other search procedures used by the government,



including the strip search, he found the cavity inspections to be invalid. Pet.App.153a. The court of appeals affirmed the decision, finding the inspections to be of little actual utility and "in the circumstances presented by this record" a "procedure [which] shocks one's conscience." Pet.App. 30a.

The search procedure requires that after every contact visit an inmate of either sex, after removing all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for a visual inspection by a correctional officer. For women inmates, a suitable position must be assumed for a visual inspection of the vaginal cavity. Men must raise their genitals for a similar inspection. Because of pressures of time, these inspections, which the district court characterized as "affronts, repulsive in the most evident respects," Pet.App.153a, are frequently made in the presence of other inmates. A.77. Nor does the matter stop there: the uncontradicted expert testimony established that cavity searches inevitably engendered psychological sadism, with a fear by inmates of sexual assault. A.49. Further, uncontradicted testimony credited by the district court was that guards at the MCC did on occasion make threats of physical abuse. Pet.App. 149a. Such fears as are engendered by the search are factors in its unreasonableness and invalidity. See *United States v. Martinez-Fuerte,* 428 U.S. 543, 558 (1976); *United States v. Ortiz,* 422 U.S. 891, 894-895 (1975). Indeed, a strip search is itself an indignity, *United States v. Guadalupe-Garza,* 421 F.2d 876, 878 (9th Cir. 1970), constituting an "extensive invasion of privacy." *United States v. Asbury,* No. 78-1149, slip op.

5137, 5140 (2d Cir. Nov. 13, 1978). A vaginal perusal is a "serious invasion of personal privacy and dignity." *Henderson v. United States,* 390 F.2d 805, 808 (9th Cir. 1967).

The humiliation and indignities caused by these searches were testified to by experts and inmate witnesses. A.36-37, 41, 45, 48. Not disputing the indignity involved, the government points to the testimony of its own witnesses asserting that visual inspection of genital and anal cavities is a necessary and reasonable means of discovering and deterring smuggled contraband. Pet.Br.72-73. However, the court of appeals' conclusion that the offensive search is of little actual utility, Pet.App.30a, and the evidence supporting that conclusion, put both claims to rest.[55] The credited testimony of a medically-trained prison psychiatrist was that the visual cavity inspection will disclose no contraband concealed beyond the anal sphincter muscle. Pet.App.150a. Further, if items are hidden merely between the buttocks, they would be discoverable by a mere observation of the resulting unnatural gait. A.49-50.

Furthermore, experts testified without contradiction that prevailing conditions made it virtually impossible for an inmate to hide anything in the anal or genital cavities during a visit. The experts testified that the process of inserting material into the rectum is painful and would require more time and opportunity than is

[55] The conclusion that the cavity inspection was of little utility was not based solely on the infrequency with which contraband was actually discovered, as the government asserts, Pet.Br.71, but upon the totality of the circumstances, which make concealment of contraband in the body cavities inspected virtually impossible.



available in the visiting rooms. A.49. The lack of privacy in the visiting rooms is established by the record: occupants of the glass-enclosed room are under continuous observation by a correctional officer. Pet.App.131a; J.A.1208-1209; J.A.144 para. 3.[56] This opportunity to observe visitors and inmates in the visiting room is enhanced by the correctional officer's power to control the number of people in the visiting room and by limiting the number to no more than 24. J.A.1208. Furthermore, the inmate's entrance to the visiting room from the adjoining residential unit is supervised by a correctional officer who searches the inmate as he enters the visiting room, and ushers him in. A.41; J.A.144 para. 2F; Pet.App.131a. Observation remains unlimited, for inmates are forbidden to use the locked lavatories; visitors may use them only by requesting a key from a correctional officer,[57] thus putting the officer on notice both that the lavatory is being used and of the identity of the person using it. Since the time of trial, the door to the visiting room lavatories has contained a built-in window. The visiting rooms are closely supervised,[58] and the finding that "the inmates

[56] This policy statement was attached as Exhibit C to Warden Taylor's affidavit of January 19, 1976, concerning visiting.

[57] The district judge did not consider this fact because he ruled that the lavatory should remain unlocked. Pet.App.135a. The court of appeals reversed the order, requiring use of the key, Pet.App.15a, and thus was well aware of this fact when the cavity search was held invalid.

[58] The government's assertion that visits at the MCC are "largely unsupervised," Pet.Br.76, is totally at odds with the record, and can be made only by ignoring the evidence. Furthermore, the implication that the district court found that visits are "loosely" monitored, Pet.Br.72 n.54, is simply not correct. The government's assertions are obviously the only way to avoid the inconsistency between its practice and its own standard, DRAFT FEDERAL STANDARDS FOR CORRECTIONS, discussion of

*(continued)*

and their visitors are in full view during the visits," Pet.App.151a, is fully supported by the record.

Uncontradicted expert testimony was that the uniforms[59] used were a factor preventing concealment of contraband in body cavities. It was virtually impossible for an inmate wearing one of these one-piece, brightly colored jumpsuits to conceal anything in the vaginal or anal cavity without removing the top of the jumpsuit, an effort which would easily be observed by the officer watching the room. A.45; see J.A.925.

The government used equally thorough procedures to search visitors, whose packages and belongings could be thoroughly searched by electronic devices, fluoroscope, and by hand by the correctional officers in the jail lobby reception area prior to reaching the visiting room. A.93; J.A.601, 1077. The correctional officer might require that an entire package or parcel, or any portion thereof, be left on the first floor of the institution. Regulations forbade the taking of food, medication, or cosmetics into the visiting rooms. J.A.144, 838, 1077-1078, 1080. In addition, as noted above, the inmate was searched before being admitted to the visiting room.

These security precautions were continued after the visit was completed by strip-searching each inmate and examining his clothing and body, including armpits, hands, mouth, and feet. Uncontradicted expert testi-

*(footnote continued from preceding page)*

Standard 013 at 37, which prohibits causeless random cavity searches. See Pet.Br.76 n.58.

[59]This uncontradicted testimony was not considered by the district judge, who prohibited use of the uniforms. Pet.App.168a. However, it was clearly relevant to the court of appeals' decision, which reversed the lower court as to uniforms, Pet.App.34a, and is further basis for the conclusion that the cavity search was of little utility.



mony showed that weapons and other metallic items such as coins concealed in body cavities could be detected by use of metal detectors, and drug use ascertained by urine tests given at the jail.

The district judge also considered the effect of both the strip search and the cavity inspection on deterrence. He deferred to the government's claim that the strip search might deter the introduction of contraband and permitted the continued use of that procedure for all inmates. Pet.App.153a. The court of appeals agreed, although finding even that procedure to be humiliating and degrading. Pet.App.30a. On the other hand, the district judge found that the attempt to place something in the body cavities is "an imposing challenge to nerves and agility, . . . likely to deter many or most, . . ." and therefore could not justify "these extensive and offensive aspects of the strip search." Pet.App.151a.

The court of appeals, considering the record, similarly concluded that the cavity inspection was a "gross violation of personal privacy" which was not outweighed by the government's interest in maintaining a practice of so "little actual utility." Pet.App.30a.[60]

The decision of the courts below is consistent with precedents stating that strip searches are prohibited absent the opportunity to conceal contraband,[61] or

[60]The only part of the record cited by the government, Pet.Br.72 n.54, in support of the usefulness of the inspection, was an incomplete quotation which, when read in full, does not support the government's position. A.71; see *supra* at 18, n.22.

[61]Some of the cases cited by the government, Pet.Br.72-73, to support its position present a factual basis establishing an opportunity for concealment of contraband. *Bell v. Manson*, 427 F.Supp. 450 (D.Conn. 1976) (search upon return from outside the facility for court

*(continued)*

cause to believe that a specific person has been involved in smuggling. *United States v. Asbury, supra,* slip op. at 5140; *United States v. Guadalupe-Garza, supra,* 421 F.2d at 879; *United States v. Smith,* 557 F.2d 1206, 1208-1209 (5th Cir. 1977), *cert. denied,* 434 U.S. 1073 (1978). Here, the courts permitted the strip search without cause, limiting only the visual cavity inspection to instances where it was based on probable cause as determined by the correctional officer.

**B. Prevention of detainees' observation from a reasonable distance of frequent and random cell searches was properly held unreasonable.**

Searches of individual cells and shakedowns of groups of cells were conducted frequently and randomly. Inmates, even if present on the housing unit, were generally forbidden to observe searches of their

*(footnote continued from preceding page)*
appearance); *Penn El v. Riddle,* 399 F.Supp. 1059, 1062 (E.D.Va. 1975) (inmate subjected to a body cavity search immediately after finding contraband on inmate's work clothing in his work area); *Hodges v. Klein,* 412 F.Supp. 896, 900-903 (D.N.J. 1976) (searches permitted whenever leaving or entering facility, after completely private contact visits, and for probable cause); *Daugherty v. Harris,* 476 F.2d 292 (10th Cir.), *cert. denied,* 414 U.S. 872 (1973) (rectal examination permitted of those leaving a maximum security institution housing many dangerous inmates where there were known instances of hidden contraband and injuries to officers). Opinions in other cases cited do not reveal the circumstances in which the challenged search was permitted. *Bijeol v. Benson,* 404 F.Supp. 595, 600 (S.D.Ind. 1975) (factual context not described; claim is merely that the searches were conducted without probable cause and without a warrant); *Giampetruzzi v. Malcolm,* 406 F.Supp. 836, 844 (S.D.N.Y. 1975) (high risk inmates searched after personal visits; search described as "strip search," but no reference to anal or genital inspection, *id.* at 844).



cells unless a particular staff member decided to permit observation. The prohibition was absolute when searches were conducted of the whole unit by teams of guards. The correctional staff frequently disregarded the rule that cells were to be left in the condition in which they were found prior to the search. Thus, inmates frequently returned to their cells to find their contents, including legal documents and bedding, strewn about in disarray. This resulted in fears by inmates that property had been removed by the searching guards. Pet.App.154a.

These search procedures and the unauthorized behavior of correctional officers were found by both courts below to be an affront to the privacy and dignity to which a detainee is entitled. Pet.App.31a, 155a. Without in any sense limiting the government's right to search extensively in the cells among the few belongings permitted inmates, the courts reasoned that if the inmate were permitted to observe the search, the correctional officers would be less likely to engage in arbitrary behavior, and grounds for suspicion of the officers or of theft or misconduct would be obviated, thus avoiding the oppressiveness of the existing procedure. Pet.App.31a, 155a.

The government argues that detainees have no privacy interest which would prevent cell searches, and therefore they have no right to observe them. Pet.Br. 78-79. The argument is misdirected, for it is not the government's right to conduct cell searches that is in issue, but the circumstances and manner in which such searches may reasonably be conducted.

The Fourth Amendment requires that searches be conducted in a reasonable manner, *United States v.*

*Ortiz,* 422 U.S. 891, 895 (1975); *Schmerber v. California,* 384 U.S. 757, 768 (1966), and it is clear that pretrial detainees retain some protections of the Fourth Amendment. *Bonner v. Coughlin, supra,* 517 F.2d at 1316-1317. Although searches of inmate cells may be necessary for jail security, needless procedures, especially those which gratuitously invade privacy and dignity, may render the search process punitive. *Giampetruzzi v. Malcolm,* 406 F.Supp. 836, 844-45 (S.D.N.Y. 1975). See Point I, *supra,* at 33-34, 38.

Even Warden Taylor conceded that, during searches, "it is important to preserve as much as possible the privacy and respect the privacy of the inmate." A.66. The government search procedure, rather than protecting the inmate's privacy and dignity interests, manifests disrespect for the individual.

After finding an infringement on privacy and dignity, the courts below found that the security interest in denying the inmate the right to observe the search asserted by the government was no interest at all. Specifically, the government cited the need to prevent distraction of the officer conducting the search and the destruction of contraband by swallowing it or throwing it out the window or down the toilet. Pet.Br. 77 and n.59. These fears are without basis. The windows at the jail cannot be opened. Further, the detainee may be removed from his cell or searched so as toseparate him from any contraband to avoid his swallowing it or using the toilet to dispose of it. The government also claims that the security of the guards and the institution would be risked. Pet.Br.80. However, Warden Taylor himself testified that guards didn't "necessarily mind" if the inmate observed the



search of a cell. A.66. Further, contrary to the government's assertion, Pet.Br.79, there is no requirement that the inmate be in the cell during the search, so long as he may observe from a reasonable distance. Pet.App.31a. In any event, the disruptive inmate may be removed from the scene. Pet.App.32a. As the government's own witness testified, when detainees are permitted to observe the search of their cells, the searches are conducted without excess and inmates do not become argumentative. A.73. Thus, it was established that the government's fears were exaggerated, and the decisions of the courts below were correct.

### C. The total prohibition on possession and use of private property from outside the institution is a denial of a substantial right and violative of the due process clause.

Inmates of the MCC are not permitted to receive personal property or food from outside the institution. The courts below, in disapproving this prohibition, required the government only to devise reasonable regulations regarding packages. Pet.App.33a.

The government had claimed, in defense of its policy, that the ban was justified by the concern that permitting inmates to possess personal property would result in risks of thefts and inmate conflict, Pet.Br.61, and in sanitation and storage problems. Pet.Br.61 n.46. Those assertions appear now abandoned, and justifiably so in light of the government's policy of selling personal property and food from the jail commissary to inmates with sufficient money. Pet.App.164a. The only

currently asserted justification for the absolute prohibition is security—the smuggling of contraband into the institution in items of personal property or food. Pet.Br.65.

The government first asserts that the broad prohibition is reasonable because there is no constitutional interest in receiving packages. Pet.Br.62. Such a statement of the issue misses the point, however; of concern here is the total denial to inmates of all their personal property. Admittedly, the fact of incarceration and the need for safe maintenance of the jail are inconsistent with the unrestricted access to a wide variety of items of property enjoyed by unconfined persons. However, even these necessary restrictions on the accustomed use of property constitute "one of the deepest miseries of incarceration," Pet.App.158a, and, accordingly, deprivations of property should be no more stringent than the need dictates. The absolute denial of property in this case sweeps so far beyond that which is necessary for the government's legitimate purpose as to constitute punishment—a view which the government admitted in the district court. Pet.App. 165a-166a.

The government's prohibition violates not only the right of detainees to be free from punishment, but also the constitutionally protected right to use and enjoy property.[62] The right to "enjoy" property, *Lynch v.*

[62]The fundamental nature of property rights under our constitutional system has been explicitly recognized:

> . . . [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare

*(continued)*



*Household Finance Corp.*, 405 U.S. 538, 552 (1972), and to "acquire, use, and dispose of" property, *Buchanan v. Warley*, 245 U.S. 60, 74 (1917), have long been recognized as integral to our conception of property. Further, ". . . it is now settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the [Fifth] Amendment." *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972), citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1971).

*Fuentes v. Shevin, supra*, and its progeny, stand for the proposition that such temporary, nonfinal deprivations of property must be circumscribed by procedures protecting against baseless *ex parte* seizures and providing for a prompt adversary determination of a seizure's propriety. Compare *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601 (1975), with *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). However, the requirement of procedural due process is itself premised on the constitutional stature of the right to use property. *Fuentes v. Shevin, supra*, 407 U.S. at 86; *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606. As with other constitutional rights, then, restrictions on personal property are justified only to the extent necessary to serve the

*(footnote continued from preceding page)*

> check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). The precise nature of property at issue is irrelevant to the constitutional status of the right. *Fuentes v. Shevin*, 407 U.S. 67, 89-90 (1972).

compelling interests of appearance at trial and safe custody.[63]

In addition to property rights *per se*, the government's total prohibition also implicates equal protection concerns. The indigent inmate who is unable to purchase goods at the MCC commissary is denied even the right to use comparable goods he already has at home.

To justify the absolute restriction imposed here, the government, as noted, claimed security—the smuggling of weapons and food. Here, the talismanic nature of the government's security argument is most apparent. The testimony at trial designed to justify the absolute prohibition was based on the assumption that only a rule permitting unlimited entry of property and food could be the alternative to the complete bar. See A.79-80. The real point, however, is that the government has failed to consider that reasonable regulations permitting entry of specified quantities and types of goods are an appropriate accommodation—one which

[63]An illuminating factual analogy is the law regarding seizures of allegedly obscene material pending an adversary hearing on the issue of obscenity. Such seizures are limited to a single copy of each item for purposes of preservation of evidence. Mass prehearing seizures are prohibited, and indeed, if only one copy of the disputed item is available, it must be made available for copying or else returned. Compare *Heller v. New York*, 413 U.S. 483, 492-493 (1973), with *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964), and *Marcus v. Search Warrant*, 367 U.S. 717 (1961). These cases, of course, involve First Amendment questions as well as property rights, but they also show that even temporary deprivations of property for a legitimate governmental interest must be limited in scope to what is necessary to serve that purpose.



has been struck at other institutions.[64] The government's only response to this moderate position—the position taken by the courts below—is that a total prohibition may be imposed to avoid even "manageable" burdens. Pet.Br. 64 n. 48. Thus, it appears that behind the government's facade of security concerns lies an actual motive to avoid administrative inconvenience.

**D. The government's proposed changes in the "publisher only" rule warrant a dismissal of the writ of certiorari as improvidently granted. Alternatively, the order below should be affirmed because the "publisher only" rule is an unjustified infringement on First Amendment rights.**

When this lawsuit began, and throughout the proceedings below, the government enforced a "publisher only" rule. In its brief, Pet.Br.66 n.49, the government informs the Court that on July 17, 1978—five days before the filing of the petition for writ of certiorari—the rule was modified to permit receipt of printed material from bookstores. In addition, the brief gives notice that the Bureau of Prisons is "in the process of

[64]In addition to evidence in the present record, jail officials have recently agreed to permit receipt of personal property in litigation involving the populous pretrial detention system of New York City. Stipulations for the Entry of Partial Final Judgment, paras. A.1, E, filed December 1, 1978, in *Maldonado v. Ciuros*, 76 Civ. 2854 (S.D.N.Y.); *Ambrose v. Malcolm*, 76 Civ. 190 (S.D.N.Y.); *Forts v. Malcolm*, 76 Civ. 101 (S.D.N.Y.); *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y.); *Detainees of the Queens House of Detention v. Malcolm*, 73 C 1354 (E.D.N.Y.); *Detainees of the Brooklyn House of Detention v. Malcolm*, 73-C-261 (E.D.N.Y.).

changing the rule" to allow receipt of paperback books, magazines, and other soft-covered materials from any source. Pet.Br.66 n.49, 69 and n.51. Accordingly, in its brief, the government submits for review here only that part of the order prohibiting the bar on receipt of hard-covered books. Pet.Br.69.

While we believe that, on the facts as they existed, the rulings below were correct, the proposed modifications in the "publisher only" rule signify a material change in the circumstances. See *Sanks v. Georgia,* 401 U.S. 144 (1971). The government has never informed the district court of the proposed changes or sought a change in the ruling from the courts below. Such an application should be an appropriate way to proceed (see Rule 60(b), Fed.R.Civ.P.), rather than seeking from this Court a change in the order based on new facts. In view of these changes, the district court should be given an opportunity to determine whether the order permitting receipt of all printed material is still required, or whether some modification is warranted, *e.g.,* to require limited entry of hard-bound books from other than the publisher or to mandate some modification in the MCC library. Accordingly, it is respectfully requested that, on this issue, the writ of certiorari be dismissed as improvidently granted. In the event that the issue of the "publisher only" rule is determined on the merits, the order below should be affirmed.

The government does not dispute the First Amendment right to receive ideas and information in the form of literature or otherwise. *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390 (1969); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Martin v. Struthers,* 319 U.S. 141, 143 (1943). The government agrees further,



Pet.Br.30-31, that fundamental rights may be limited only by a compelling governmental interest, to the extent necessary to protect that interest.

While not disputing that inmates, both convicted and pretrial, have a First Amendment right to information, including books and other printed materials, *Morgan v. LaVallee,* 526 F.2d 221, 224 (2d Cir. 1975); *Owens-El v. Robinson,* 442 F.Supp. 1368, 1388-1389 (M.D.Pa. 1978); *Inmates of Milwaukee County Jail v. Peterson,* 353 F.Supp. 1157, 1169 (E.D.Wis. 1973), the government enforced the "publisher only" rule, asserting the possibility that contraband would enter the institution in books. Although Warden Taylor asserted that the detection of contraband would require a search between pages, which would be difficult and might require destruction of the book, he gave no reason for not attempting to use electronic devices and fluoroscopes or limiting the number of books sent to an inmate—procedures used in other institutions.

The record in this case and the government's concessions before the Court demonstrate that the prohibition was an exaggerated response to the government's interest. Warden Taylor's own affidavit makes a distinction between hard- and soft-covered books, A.24, as does the newly proposed plan to permit soft-covered books and magazines to enter the institution from any source, Pet.Br.69. Furthermore, the modification of the regulation to permit receipt of books from bookstores without limit, Pet.Br.66 n.49, demonstrates that even as to hard-cover books, the security risk is not compelling. United States Department of Justice, DRAFT FEDERAL STANDARDS FOR CORRECTIONS, Standard 002 at 63 (1978).

While not to be disparaged, the security interest does not justify an infringement on the First Amendment as overbroad as the one the government chose to impose. The asserted security interest ultimately relies upon the government's unwillingness to inspect adequately the printed matter sent into the jail. As such, it amounts to no more than a claim of administrative inconvenience, an interest insufficient to overcome so severe a limitation on fundamental rights. *Estelle v. Williams, supra,* 425 U.S. at 505; see *Johnson v. Avery, supra,* 393 U.S. at 486, 488.

As the court below found, the severity of the restriction was not cured by alternative means of access to printed matter, Pet.App.26a-27a, because these sources were inadequate. Many books sought by inmates are not available from the library. If inmates are limited to the books in the MCC library, the government becomes the arbiter of what may be read, especially by those inmates financially unable to make a purchase from the publisher, by those not able to communicate with the publisher, and by those desiring books no longer in print or otherwise available from a publisher.[65]

[65]For the inmate who had the desired material at home or otherwise had access to it, such a denial is qualitatively more than a mere loss of a "cost advantage" such as existed in regard to bulk mailings in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra,* 433 U.S. at 130-131.



## CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed in all respects.

Respectfully submitted,

PHYLIS SKLOOT BAMBERGER
WILLIAM E. HELLERSTEIN
DAVID J. GOTTLIEB
MICHAEL B. MUSHLIN
The Legal Aid Society
Federal Defender Services Unit
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

*Counsel for Respondents.*

JOHN BOSTON,
NANCY LEE,

*Of Counsel.*

FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 10 1979
MICHAEL RODAK, JR., CLERK

No. 77-1829

# In the Supreme Court of the United States

OCTOBER TERM, 1978

GRIFFIN B. BELL, ET AL., PETITIONERS

*v.*

LOUIS WOLFISH, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# INDEX

## CITATIONS


| Cases: | Page |
|---|---|
| *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 | 12 |
| *Cort* v. *Ash*, 422 U.S. 66 | 14 |
| *Davis* v. *United States*, 417 U.S. 333 | 13 |
| *Newman* v. *Alabama*, 559 F.2d 283 | 5 |
| *Sanks* v. *Georgia*, 401 U.S. 144 | 9 |
| *Sullivan* v. *United States*, 348 U.S. 170 | 14 |
| *United States* v. *Lockyer*, 448 F.2d 417 | 14 |
| *United States* v. *Mapp*, 561 F.2d 685 | 14 |
| *United States* v. *New York Telephone Co.*, 434 U.S. 159 | 12 |
| Constitution and Statutes: | |
| United States Constitution, Article III | 11 |
| Bail Reform Act of 1966, 18 U.S.C. 3041 *et seq.* | 11, 12 |
| 18 U.S.C. 3146 | 12 |
| 18 U.S.C. 3148 | 12 |
| 18 U.S.C. 4042(2) | 10, 14 |
| 28 U.S.C. 2241(c)(3) | 13 |
| 28 U.S.C. 2243 | 11 |

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

No. 77-1829

GRIFFIN B. BELL, ET AL., PETITIONERS

*v.*

LOUIS WOLFISH, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## REPLY BRIEF FOR THE PETITIONERS

---

### I.

Respondents essentially adopt the reasoning of the court of appeals, arguing that because pretrial detainees retain a presumption of innocence and may not be subjected to punishment before being convicted, due process requires the government to justify restrictions placed on them—such as double-celling in rooms originally designed to house one person—by a "compelling necessity." They contend that administrative and fiscal requirements may thus not be considered in evaluating the constitutionality of condi-

tions of pretrial confinement. Further, while recognizing that the needs of institutional security may justify restrictive practices, respondents maintain that the court of appeals was correct in holding that the several challenged practices at the Metropolitan Correctional Center (MCC) are not justified by legitimate security considerations and thus constitute unreasonable restrictions on both convicted inmates and pretrial detainees. For reasons set forth in our opening brief, we believe those arguments to be incorrect. Several matters in respondents' brief, however, warrant additional comment.

1. Respondents claim (Resp. Br. 37, 38-39) that the due process standard employed by the court of appeals is not a broad test requiring the government to show a compelling necessity for every restriction imposed on pretrial detainees, but is instead a very selective standard that applies only when a "substantial" right is being infringed. In illustration of the claimed limited applicability of the court's compelling necessity standard, respondents note that the court of appeals reversed the district court's action with regard to several "insubstantial" deprivations, such as the ban on personal typewriters, the required wearing of uniforms, and the restricted access to visiting room bathrooms (*Id.* at 39).

Respondents' characterization of the decision below finds no support in the court's articulation of its due process standard, nor in its explanation of specific applications of the standard. The court was emphatic in its statement of the breadth of its constitutional holding (Pet. App. 11a-12a; citations omitted):



> Time and again, we have stated without equivocation the indisputable rudiments of due process: pretrial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration.

The court did not suggest that its due process standard applies only to rights deemed "substantial;" to the contrary, the court indicated without qualification that the standard is designed to protect for pretrial detainees "the rights afforded unincarcerated individuals" (Pet. App. 11a).

To be sure, as we noted in our brief (Br. 40 n.32), the court of appeals seemingly did not consistently apply its due process reasoning in review of various challenged practices. In those instances where the compelling necessity standard was clearly applied, however, the court failed first to determine the nature of the constitutional interest affected by the governmental restriction before determining the appropriate standard of governmental justifications. Thus, for example, while the court banned doublecelling because it said the government had failed to show a compelling necessity for "the substantial abrogation of personal privacy," it never discussed the nature of the "right to privacy" here involved or made any specific finding that the right was sufficiently "substantial" to be deserving of the special protection afforded by the "compelling necessity" standard (Pet. App. 17a-19a; see Br. 46-47). Nor did the court ever attempt to formulate any guide-

lines for identifying those rights that should be considered "substantial."

There is thus no basis for respondents' claim that the standard employed by the court in this case is one of very limited and selective application, reserved for only a certain undefined category of "substantial" rights.

Moreover, as is discussed in detail in our brief (Br. 28-35) there is no basis in the decisions of this Court for any conclusion that the government must show a "compelling necessity" to infringe "substantial," but not fundamental, personal liberties. The decision of the court of appeals is not made defensible merely by asserting that substantial or important personal interests are affected by the challenged government action. See *id.* at 28-32.

2. In support of the district court's conclusion, on a motion for summary judgment, that double-celling in the residential rooms at the MCC was unconstitutional, respondents refer to the "uncontradicted" statement of the MCC architect that the rooms were specifically planned and designed to house one person and that double-celling would be a " 'clear and apparent violation of capacity * * *' " (Resp. Br. 11, 40).

Initially, it should be made clear that this "uncontradicted sworn statement" was not part of the trial testimony in this case. Instead, it was an excerpt from testimony given in a different proceeding not involving these parties. It was submitted in this case as part of respondents' affidavit in support of their motion for summary judgment (A. 9). Quite apart



from the question whether this unexamined testimony may be relied on by the district court in disposing of a motion for summary judgment (see Pet. App. 205a-206a n.5), it remains our position that the issue of double-bunking was not a proper subject for summary judgment in this case (Br. 49-54) and that the architect's opinion does not constitute an adequate basis for finding a due process violation. Institutional design is only one factor to be considered in determining whether a constitutional violation has occurred, since "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space." *Newman* v. *Alabama*, 559 F.2d 283, 288 (5th Cir. 1977). As is discussed in detail in our brief (Br. 44-46, 49), several other factors relating to the reasonableness and constitutionality of double-celling in the particular context of the MCC remained unexamined by the courts below.[1]

Respondents contend (Resp. Br. 48-50), however, that the government cannot argue that considerations of cost and administrative inconvenience justify double-celling at the MCC because, since the date of the district court's order, the administrators have been able to comply with a single-cell requirement.

---

[1] Respondents also seek to rely on other cases involving minimum space requirements for different institutions (Resp. Br. 41 n.40). As we have noted, however, this ignores the fact that conditions at the MCC, with its modular unit design, differ markedly from those in other institutions (Br. 52-53). The error of the district court was precisely that of relying on evidence concerning these different factual situations and failing to conduct a particularized inquiry at the MCC.

This argument is wholly insubstantial for several reasons. First, it has, in large part, been possible to eliminate double-celling at the MCC because the number of persons committed to the Bureau's custody for housing at that facility has significantly diminished. The planned capacity of the MCC at the time it opened was 449 inmates (Pet. App. 6a). At the time of the district court's ruling enjoining double-celling at the MCC, on January 19, 1977 (A. 3), there were, according to the records of the Bureau of Prisons, 535 inmates at the MCC, including 298 pretrial detainees. On January 5, 1979, by contrast, there were only 417 inmates, of which only 163 were pretrial detainees. This substantial reduction in the number of pretrial detainees committed to the Bureau's custody in the New York Metropolitan area has made it feasible at present to forego double-celling. But this says nothing about the feasibility of eliminating double-celling if, as is entirely possible, the number of detainees were again to increase to higher levels.

The second flaw in respondents' argument is apparent from its face. The argument is based on the unrealistic assumption that since it is *possible* to comply with a single-celling order, no administrative difficulties or additional expenses are encountered in doing so. Moreover, respondents overlook the fact that the government was precluded from offering evidence of administrative and fiscal requirements by the district court's award of summary judgment and the court of appeals' express refusal to consider



these governmental interests in its constitutional analysis (Pet. App. 12a). In our brief (Br. 49-50), we have pointed to some of the factual elements of administrative necessity and fiscal concern that should properly be considered in determining the constitutionality of double-celling at the MCC. These issues should properly be explored on remand, rather than in this Court, since the rulings below have forestalled their development in this record.

3. Respondents also assert (Resp. Br. 59 & n. 60) that the government failed to offer any evidence to show that visual body cavity inspections following contact visits are of any actual utility in preventing or discovering the smuggling of contraband into the facility. Respondents note that expert testimony quoted in our brief (Br. 72 n.54) states that secretion of contraband in the rectum is not only feasible but has been known to occur. They claim, however, that this testimony, "when read in full, does not support the government's position" (Resp. Br. 59 n.60).

When the testimony in question is read in its context, it is apparent that it establishes the institutional need for this search procedure. In the course of discussing the procedure employed for visual inspection of body cavities, the witness was asked by the district court whether "a fully-dressed inmate in a visiting room could feasibly or with any frequency secrete contraband in the rec[t]um" (A. 71). He responded: "Absolutely. I know of cases where it

has happened" (*ibid.*).[2] He then went on to say: "It does not stop, your Honor, and would not stop somebody swallowing something, whether it passed in a balloon and swallowed something in a balloon and then passing it later, when they get back in the unit" (*ibid.*). In so stating, the witness was not contradicting what he had just said—that the government's concern about the possibility of contraband being secreted in body cavities was not imagined but was based on past experience. Instead, he was referring to his ongoing testimony concerning the body cavity inspection procedure and explaining that there are ways of circumventing even this relatively thorough form of inspection. As the witness later stated expressly (A. 72), the contraband problem is serious enough that even the most drastic preventive measures are not always completely effective. Far from suggesting that such search procedures are useless, the witness described additional measures that could be employed to help stem the problem of smuggled contraband, including restrictions on visiting for persons found to have smuggled contraband into a facility with the help of a visitor (A. 71-72). Viewing this testimony in its proper context, it is apparent that the witness was expressing the reality of the

[2] This testimony also demonstrates that, contrary to respondents' assertion (Resp. Br. 58), the record does not contain "uncontradicted expert testimony" that the one-piece uniforms worn by MCC inmates make it impossible for them to conceal contraband in the vaginal or anal cavity. Indeed, the district court agreed that, though difficult, this method of concealment was possible (Br. 72 n.54).



government's security concern and the need for preventive measures, including the visual body cavity inspection. Additional substantial evidence demonstrating the need for this inspection procedure is discussed in our opening brief (Br. 70-73).

4. Respondents argue (Resp. Br. 67-68) that, in light of recent and proposed changes in the "publisher only" rule by the Bureau of Prisons (see Br. 66 n.49), this Court should dismiss the writ of certiorari as improvidently granted to the extent that it seeks review of the order enjoining further application of the "publisher only" rule at the MCC. This argument, however, is not substantial. Unlike the situation in *Sanks* v. *Georgia*, 401 U.S. 144 (1971), on which respondents rely (Resp. Br. 68), the Bureau of Prisons has not substituted an entirely different regulatory scheme and wholly abandoned the requirements that were invalidated below. The fact that the government no longer challenges the order of the district court as applied to soft-covered materials (Resp. Br. 68) does not detract from the significance of the institutional security interest in limiting entry of hard-covered materials from private sources (Br. 66, 68-69 & n.51). The government has simply chosen to limit its disagreement to that aspect of the district court's order that occasions greatest concern—an option that would be available even if the agency did not propose voluntarily to modify its rule.[3]

[3] We noted in our brief that the "publisher only" rule has been amended to allow receipt of materials transmitted to the

## II.

In a brief filed by the NAACP Legal Defense and Educational Fund, Inc. (the "Fund"), as *amicus curiae*, two additional arguments in support of the court of appeals decision have been advanced. They contend (1) that federal courts have inherent authority to correct the conditions of pretrial detention because persons awaiting trial remain within the courts' continuing jurisdiction and (2) that to the extent the practices at issue in this case are inconsistent with the Draft Federal Standards for Corrections, they violate the Attorney General's determination of the "suitable quarters" to be afforded inmates under 18 U.S.C. 4042(2). These claims have not been raised in the courts below in this case nor, so far as we are aware, in any other case. Nor have they been raised or briefed by either party in this Court. They therefore need not be considered by this Court. In any event, the arguments lack merit.

---

MCC from bookstores as well as from publishers (Br. 66 n.49). Respondents' claim (Resp. Br. 69) that the change demonstrates that "even as to hard-cover books, the security risk is not compelling." While there may be some increase in the risk of contraband being introduced whenever additional sources are allowed, this modification in the security practice merely reflects the judgment of the Bureau that, as in the case of books mailed directly from publishers, books mailed from bookstores are far less likely to contain contraband then books mailed from private sources. This limited extension of permitted sources does not negate the government's basic concern that hard-cover books are particularly serviceable for the concealment of contraband and extremely difficult to search effectively.



1. The Fund maintains that the federal courts have inherent power to correct conditions of confinement for detainees because those charged with crime remain within the jurisdiction of the court (Am. Br. 22-37). It claims that since federal courts have the power to admit an accused to bail and to set conditions on the granting of bail, courts necessarily have the power to specify appropriate conditions of confinement for persons who are not released on bail. The Fund argues that this power may be exercised in a *habeas corpus* proceeding pursuant to the court's authority to "dispose of the matter as law and justice requires" (*id.* at 37, quoting 28 U.S.C. 2243).

The argument advanced by the Fund has substantial flaws:

(a) Nowhere does the brief identify the source of the courts' inherent authority to determine suitable conditions of confinement for persons not released on bail. It may, at the least, be doubted whether an administrative authority over pretrial commitment could properly be delegated to or assumed by the Judicial Branch consistent with Article III of the Constitution. The Fund suggests, however, that the courts' "inherent authority" over confinement conditions emanates from its power to grant bail and "from the authority of the court over the person within its jurisdiction" (Br. 29). The authority to which the Fund refers—the power to grant bail—has been comprehensively organized by Congress in the Bail Reform Act of 1966, 18 U.S.C. 3041 *et seq.* There is nothing in that Act establishing any

judicial authority over confinement conditions. Instead, the Act directs the court, in situations where release is not granted under conditions specified by the Act (*e.g.*, 18 U.S.C. 3146, 3148), to imprison the defendant for trial (18 U.S.C. 3041). Where imprisonment for trial is ordered, 18 U.S.C. 4042 specifies that "[t]he Bureau of Prisons, under the direction of the Attorney General, shall * * * (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with * * * offenses against the United States * * *." Thus, even if some "inherent authority" to administer jails imaginably once existed, it has been displaced by a congressional delegation of this very power to an executive agency. Cf. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172-173 (1977); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

(b) The claimed inherent judicial authority to mandate suitable conditions of pretrial confinement would lead to absurd results. Since it is basic to the Fund's contention that this inherent authority is not dependent on a finding that conditions of pretrial confinement are unconstitutional (Am. Br. 24), each individual committing judge or magistrate could require in each individual case those conditions of confinement that he or she regards as suitable. Not only could each judge or magistrate differ as to what constitutes appropriate conditions, but each judge or magistrate could impose different confinement conditions for different detainees. The complete absence



of any uniform standards under such a regime would, as a practical matter, make institutional confinement impossible. The assertion of inherent power by each committing judge or magistrate would produce a chaos of varying requirements that would make uniform administration infeasible.[4]

c. Even if the claimed inherent judicial authority to specify conditions of confinement were thought to exist, it could not be exercised in a class action habeas corpus proceeding such as this case. When conditions of confinement are challenged by means of a petition for a writ of habeas corpus, as in the present case, the court has power to grant relief only if it can be shown that a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). See *Davis* v. *United States*, 417 U.S. 333, 344 (1974). It would not suffice for a court to find that some condition of confinement seemed unreasonable or unwise, absent some violation of a statutory or constitutional right.

If the authority could be exercised at all, it would, by the Fund's own hypothesis, have to be pursuant to a motion directed to the committing judge or magistrate to grant or alter bail or release conditions. Such a motion is plainly not amenable to class action treatment of the type involved in this case, since not every inmate at a pretrial facility will have

---

[4] For example, some committing judges could insist that detainees be housed one to a cell, while others could require that detainees be housed at the MCC rather than at other, more distant facilities. Compliance with both requirements might prove impossible.

been ordered to custody by the same judge (or, in the case of the MCC, not even by judges within the same district court or even within any single federal circuit).

In short, this argument is devoid of any practical or logical merit.

2. The Fund claims that, by issuing the Draft Federal Corrections Standards for comment (see Br. 54 n.43), the Attorney General "has already expressed his expert determination" under 18 U.S.C. 4042(2) as to the "suitable quarters" that must be afforded to pretrial detainees (Am. Br. 46). It argues that these "standards specifically prohibit the practices at issue in this case" (*id.* at 41).

The Fund is in error as to each of its contentions. By issuing the Draft Standards for public comment, the Attorney General has not promulgated them as regulations with the force of law and is not bound by them. *Sullivan* v. *United States*, 348 U.S. 170, 173 (1954). Moreover, even if the Draft Standards were hereafter to be formally adopted by the Attorney General, they expressly state that they embody liberal administrative goals only and do not intend to confer any rights or legal cause of action on any individuals (Br. 54-55 n.43). They thus provide no basis for judicial enforcement of private claims. See *Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *United States* v. *Mapp*, 561 F.2d 685, 690 (7th Cir. 1977); *United States* v. *Lockyer*, 448 F.2d 417, 421 (10th Cir. 1971). Finally, the institutional practices for which review is sought in this case are either consistent



with the proposed administrative goals set forth in the Draft Standards (Br. 54-55 n.43, 76 n.58), are not discussed under the Draft Standards (*i.e.*, room search procedures), or remain under study by the Bureau and the Attorney General.

## CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JANUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 284533 271

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1829

GRIFFIN B. BELL, et al.,

*Petitioners,*

—VS.—

LOUIS WOLFISH, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
BETH J. LIEF
STEVEN L. WINTER
Suite 2030
10 Columbus Circle
New York, New York 10019

*Attorneys for Amicus Curiae*

TABLE OF CONTENTS


| | PAGE |
|---|---|
| Interest of Amicus ..... | 1 |
| Summary of Argument ..... | 3 |
| Argument ..... | 4 |
| I. Restrictions Imposed Upon Unconvicted Pre-Trial Detainees Should Not Be Upheld by Blanket Deference to The Claim of Local Jailers That Such Restrictions Are Necessary To Maintain Jail Security ..... | 4 |
| II. The Federal Courts Have Inherent Power To Correct The Conditions Under Which Persons Awaiting Trial In The Federal Courts Are Detained ..... | 22 |
| III. The Practice of The MCC At Issue In This Case Were Properly Enjoined Since They Violated The Defendants' Statutory Duty To "Provide Suitable Quarters" For Pre-Trial Detainees ..... | 37 |
| CONCLUSION ..... | 47 |

## TABLE OF AUTHORITIES

Cases


| | PAGE |
|---|---|
| Accardi v. Shaughnessy, 347 U.S 260 (1954) | 41 |
| Armstrong v. Cardwell, 457 F.2d 34 (6th Cir. 1972) | 36 |
| Barnes v. Government of the Virgin Islands, 415 F.Supp. 1218 (D. V.I. 1976) | 11 |
| Barth v. Clise, 79 U.S (12 Wall.) 400 (1871) | 25 |
| Bay County Jail Inmates v. Bay County Board of Commissioners, Civil Action No. 74-10056 (N.D. Mich. Aug. 29, 1974) | 9 |
| Benjamin v. Malcolm, 75 Civ. 3073 (S.D.N.Y. Jan. 6, 1976) | 20 |
| Berkowitz v. United States, 90 F.2d 881 (8th Cir. 1937) | 24,25,29 |
| Bongiovanni v. Ward, 50 F.Supp. 3 (D. Mass. 1943) | 25 |
| Brenneman v. Madigan, 343 F.Supp. 128 (N.D. Cal. 1972) | 13 |
| Bundy v. Katsaris, TCA 78-1913 (N.D. Fla. Nov. 1, 1978) | 13 |





| | PAGE |
|---|---|
| Campbell v. McGruder, 416 F.Supp. 100 (D.D.C. 1975), aff'd and remanded, 580 F.2d 521 (D.C. Cir. 1978) | 15 |
| Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976) | 39 |
| Coffin v. Reichard, 143 F.2d 433 (6th Cir. 1944) | 35,26 |
| Collins v. Schoonfield, 344 F.Supp. 257 (D. Md. 1972) | 3,8,11,15,19 |
| Comm. ex rel. Bryant v. Hendricks, 144 Pa. 83 (1971) | 36 |
| Conklin v. Hancock, 334 F.Supp. 1119 (N.D.H. 1971) | 11 |
| Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976) | 12 |
| Ewing v. United States, 240 F. 241 (6th Cir. 1917) | 25 |
| Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978) | 17 |
| Funchess v. Beame, No. 73 C 572 (E.D.N.Y. July 12, 1974) | 8,19 |
| Goldsy v. Carnes, 429 F.Supp. 370 (W.D. Mo. 1977), prior opinion, 365 F.Supp. 395 (W.D. Mo. 1973) | 12 |
| Grinfell v. Gladden, 241 Ore. 190 (1965), cert. denied, 382 U.S. 988 (1966) | 36 |

PAGE

Gulf States Utilities v. Federal Power Commission, 411 U.S. 747 (1973) ..... 46

Hamilton v. Love, 328 F.Supp. 1182 (E.D. Ark. 1971) ..... 3

Hughes v. Turner, 14 U.2d 128 (1963) .. 36

Inmates of The Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973) .....3,6,10,20,21

Inmates of Milwaukee County Jail v. Peterson, 353 F.Supp. 1157 (E.D. Wisc. 1973) ..... 10,19

In re Gannon, 27 F.2d 362 (E.D. Pa. 1928) ..... 25,27,29

In re Jones, 57 Cal.2d 860, 382 P.2d 310, 22 Cal. R. 478 (1962)..... 36

In re Riddle, 57 Cal.2d 848, 372 P.2d 316, 22 Cal. R. 472, cert. denied, 371 U.S. 914 (1962) ..... 36

J.I. Case v. Borak, 377 U.S. 426 (1964) ..... 40

Johnson v. Avery, 393 U.S. 483 (1969) ..... 35,36

Johnston v. Marsh, 227 F.2d 528 (3rd Cir. 1955) ..... 25,26,27

Jones v. North Carolina Prisoners' Union, 433 U.S 119 (1977) ..... 23



PAGE

Jones v. Wittenberg, 330 F.Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) ..... 2,13,16,20

Lavier v. Kansas, 209 Kan. 442 (1972) ..... 36

Manicone v. Cleary, No. 74 C 575 (E.D. N.Y. June 30, 1975) ..... 13,19

Manicone v. Corso, 365 F.Supp. 576 (E.D.N.Y. 1973) ..... 7,8,11,13

Marion County Jail Inmates v. Broderick, No. IP 72-C-424 (S.D. Ind. March 24, 1976) ..... 11,13,19

McGoff v. Rapone, 78 F.R.D. 8 (E.D. Pa. 1978) ..... 45

Mehafey v. State, 87 Idaho 228, 392 (1964) ..... 36

Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972) ..... 36

Miller v. Carson, 401 F.Supp. 835 (M.D. Fla. 1975), aff'd, 563 F.2d 741 (5th Cir. 1977) ..... 13,14,19

Miller v. United States, 6 F.2d 463 (3rd Cir. 1925) ..... 24

Morgan v. Willingham, 424 F.2d 200 (10th Cir. 1970) ..... 40

PAGE

O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582 (E.D. Mich. 1977) ..... 13,14,19

Owens-El v. Robinson, 442 F.Supp. 1368 (W.D. Pa. 1978) ..... 11,12,19

People ex rel. Brown v. Johnson, 9 N.Y.2d 482, 215 N.Y.S.2d 44, 174 N.E.2d 724 (1961) ..... 36

Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972), cert. denied, 401 U.S. 944 (1973) ..... 36

Powlowski v. Wullich, 81 Misc.2d 895 (Sup. Ct. Monroe County 1975) ..... 13

Principe v. Ault, 62 F.Supp. 279 (N.D. Ohio 1945) ..... 25

Procunier v. Martinez, 416 U.S. 396 (1974) ..... 21,23

Ramer v. Saxbe, 522 F.2d (D.C. Cir. 1975) ..... 39

Rea v. United States, 350 U.S. 214 (1956) ..... 31

Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974) ..... 6,20

Rogers v. Warden, Nevada State Prison, 84 Nev. 534 (1968) ..... 36

Saia v. Warden of Conn. State Prison, 25 Conn. Sup. 549, A.2d 520 (1964) ..... 36





PAGE

Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944) ..... 22

State ex rel Cole v. Tahash, 269 Minn. (1964) ..... 36

State ex rel Pringley v. Coiner, ____ W. Va. ____ 186 S.E.2d 220 (1972) ..... 36

State v. McCray, 267 Md. 111 (1972) ..... 36

Taylor v. Sterrett, 344 F.Supp. 411 (N.D. Tex. 1972); aff'd, 499 F.2d 367 (5th Cir. 1974) ..... 2,9

Thorpe v. Housing Authority of Durham, 393 U.S 268 (1969) ..... 44

United States v. Smith, 444 F.2d 61 (8th Cir. 1971) ..... 28

United States v. New York Telephone Co., 434 U.S 159 (1977) ..... 32

United States ex rel. Wolfish v. Levi, 439 F.Supp. 114 (S.D. N.Y. 1977) ..... 18,24,34,39,40, 44

United States ex rel Wolfish v. United States, 428 F.Supp. 333 (S.D.N.Y. 977) ..... 22,33,34

University of California Regents v. Bakke, ____ U.S. ____, (1978) 57 L.Ed.2d 750, 98 S.Ct. ____ ..... 22

PAGE

Vest v. Lubbock County Comm'rs, 444 F.Supp. 824 (N.D. Tex. 1977) ..... 10

Williams v. Richardson, 481 F.2d 358 (8th Cir. 1973) ..... 36

Wilson v. Beame, 380 F.Supp. 1232 (E.D.N.Y. 1974) ..... 14

Wise v. Henkel, 220 U.S. 556 (1911)... 31,32,33,35,37

Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978) ..... 35,39,45

Wright v. Henkel, 190 U.S 40 (1903) ..... 25

Constitution & Statutes

First Amendment ..... 15

Fourteenth Amendment ..... 15

Administrative Procedure Act, 5 U.S.C. §706 (1976) ..... 39

Bail Reform Act of 1966, 18 U.S.C. §3146 (1976) ..... 28,30

18 U.S.C. §4001 (1976) ..... 23,34,38

18 U.S.C. §4042 (1976) ..... 23,34,38

18 U.S.C. §4082(a) (1976) ..... 23

Federal Power Act, 16 U.S.C. §824c (1976) ..... 46





PAGE

§5 of Judiciary Act of 1891 ..... 32

28 U.S.C. §2241 (1976) ..... 27,37

28 U.S.C. §2243 (1976) ..... 20,35,37,40

28 U.S.C. §2254(a) (1976) ..... 37

Miscellaneous:

W. Blackstone, Commentaries ..... 16

Criminal Justice Newsletter, Vol. 9, No. 23, at 4 (Nov. 20, 1978) ..... 45,46

Developments in Law: Federal Habeas Corpus, 83 Harv. L.Rev. 1038 (1970) ..... 36

Fed. R.Crim. P. 41 ..... 31

Fed. R.Crim. P. 46(g) ..... 36

Federal Standards For Corrections [Draft], U.S. Dept. of Justice .. 20,21,40,45

The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 24 (1976) ..... 5,6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1829

==========

GRIFFIN B. BELL, et al.,

Petitioners,

- vs -

LOUIS WOLFISH, et al.

==========

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

==========

# BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE

==========

## Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939.

---

* Letters of consent to the filing of this Brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and lower courts, and it has participated as amicus curiae in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving conditions in pre-trial detention facilities and discrimination against pre-trial detainees, including Taylor v. Sterrett, 344 F.Supp. 411 (N.D. Tex. 1972), aff'd, 499 F.2d 367 (5th Cir. 1974); Jones v. Wittenberg,



330 F.Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Inmates of the Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973); Collins v. Schoonfield, 344 F.Supp. 257 (D. Md. 1972); Hamilton v. Love, 328 F.Supp. 1182 (E.D. Ark. 1971). The Legal Defense Fund has a special interest in the rights of pre-trial detainees because blacks are disproportionally unable to post bail and are disporportionately represented both in local and federal pre-trial detention facilities.

## SUMMARY OF ARGUMENT

This case presents questions of first impression in this Court affecting the conditions and practices in jails across this Nation. Restrictions imposed upon unconvicted citizens who, for the most part, are detained solely because they could not make bail, should not be upheld by blanket deference to the claims of local jailers that those restrictions are mandated by security needs. Rather, the cases of the past decade make clear that such restrictions are predominantly

rules of administrative convenience. The rules and practices at issue in this case are in the same category and should not be upheld.

Ruling on consitutitonal grounds, the courts below properly declined to defer to such "expertise" and enjoined those practices. However, the rulings below are also sustainable on non-constitutional grounds. The federal courts have inherent authority to correct the conditions under which persons who are awaiting trial in the federal courts, and who are still within the courts' jurisdiction, may be detained. In addition, the practices at issue in this case were properly enjoined since they violated the defendants' statutory duty to "provide suitable quarters" for pre-trial detainees.

## ARGUMENT

### POINT I

### RESTRICTIONS IMPOSED UPON UNCONVICTED PRE-TRIAL DETAINEES SHOULD NOT BE UPHELD BY BLANKET DEFERENCE TO THE CLAIM OF LOCAL JAILERS THAT SUCH RESTRICTIONS ARE NECESSARY TO MAINTAIN JAIL SECURITY

#### A.

This case presents questions of first impression for this Court concerning the treatment of



unconvicted citizens in our Nation's jails. Although the jail at issue here is a new facility operated by the United States Bureau of Prisons, the decision in this case will affect the rights of thousands of pre-trial detainees in every county jail and local lock-up across the United States.

Gross inadequacies in the operation of our local jails have long been the subject of official criticism. Ten years ago, the President's Commission on Law Enforcement and the Administration of Justice stated:

> It is probably true that persons who have not yet been convicted of a crime are subjected to the worst aspects of the American correctional system. Unconvicted persons, as yet legally innocent, are almost invariably subjected to the tightest security . . .
>
> This primary concern for security imposes regimentation, repeated searches, and close surveillance on detainees.

The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 24 (1967). Five years later, the American Assembly concluded that

> Local jails are even worse than prisons.... In them standards of humanity and decency are violated, and the presumption of innocence which is so basic to American Justice is ignored.

Final Report of the 42nd American Assembly (1972), quoted in Inmates of the Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 684 (D. Mass. 1973).

The reasons why local jails are operated under such restrictive measures are not difficult to fathom. Jails are normally run by local administrations, the least solvent of all governmental bodies and the most susceptible to political pressures against unpopular expenditures.[1/] Accordingly, there is an inevitable "[a]cute shortage of resources" resulting in a "shortage of trained staff and lack of program in many detention facilities." Task Force Report: Corrections, supra, at 25. Local jails generally are not operated by highly trained correctional experts but by local sheriffs and police, "law enforcement officials [who are] limited to merely custodial functions." Id. at 23.

Nonetheless, petitioners herein would have this Court accord "substantial deference" to the "expertise" of local jailers in any matter

---

1/ See, e.g., Rhem v. Malcolm, 507 F.2d 333, 342 (2d Cir. 1974).



claimed by them to be related to security. (Brief for Petitioners, p. 58.) This rule would, of course, apply not only to the United States Bureau of Prisons but to every sheriff and local warden throughout the United States. Granting such broad and unscrutinized authority to the keepers of our local jails would, we submit, be both unwarranted and unwise. As testified to by the cases that follow, the manner in which such authority has been wielded in recent years has proven to be anything but expert.

B.

The district court decisions of the past decade are replete with examples of pre-trial detention rules and practices that include the arbitrary, the self-protective, the convenient, and the purely bizzare. Many of these rules and practices have violated even the most basic constitutional rights. Nearly all have been justified by local jailers in the name of security. For example, in Manicone v. Corso, 365 F.Supp. 576 (E.D.N.Y. 1973), the sheriff had

decided to ban all newspapers from the jail. The security rationales proffered for this restriction were that newspapers might disrupt the prisoners, particularly when news of crimes or an inmate's case was reported, and that the accumulations of papers caused a fire hazard. Id. at 577. The district court did not defer to such expertise, but enjoined the practice, observing:

> The physical problems of fire control can be met by less restrictive means than total censorship. The incendiary nature of ideas and facts published in newspapers is sometimes bothersome to those in authority; under our Constitution, such inconvenience is unavoidable.

Id.

A similar practice fell to judicial scrutiny in Collins v. Schoonfield, 344 F.Supp. 257 (D. Md. 1972). There, the court enjoined the warden from censoring newspapers merely because they contained articles critical of his administration of the facility.

In Funchess v. Beame, No. 73 C 572 (E.D.N.Y. July 12, 1974), the warden of the Brooklyn House of Detention had prohibited detainees from receiving such supplies as legal size bond, onion



skin paper, carbon paper, manila folders and large legal envelopes. It was uncontradicted that the warden imposed this rule because, by his own admission, he objected to being named as a defendant in lawsuits brought by the detainees. The district court enjoined the practice. See also Taylor v. Sterrett, 344 F.Supp. 411, 422-423 (N.D. Tex. 1972), aff'd, 499 F.2d 367, 368 (5th Cir. 1974) (sheriff and other jail officials enjoined from destroying law books, legal materials and other legal documents).

Even in cases where the warden's motives may have been more well-meaning, extraordianay restrictions have been imposed upon pre-trial detainees. For example, in Bay County Jail Inmates v. Bay County Board of Commissioners, Civil Action No. 74-10056 (N.D. Mich., Aug. 29, 1974), an undersheriff had refused to send a letter of a suicidal detainee to a close relative because he feared that the letter "would disturb the recipient." Slip op. at 13. The district court invalidated such censorship.

Strict censorship of mail has, however, long been the rule in many local jails. And while

jailers have often sought to justify restrictions on correspondence as requisites of security, many such restrictions have been ultimately exposed as rules of purely administrative convenience. For example, in Inmates of Milwaukee County Jail v. Petersen, 353 F.Supp. 1157 (E.D. Wisc. 1973), detainees were limited to two pages per letter, and to one page if both sides of the paper were used. The "stated purpose" of the rule was "to discourage correspondence and to promote the convenience of the jail administration in censoring." Id. at 1164. Censorship included the deletion from outgoing mail, on "security" grounds, of notice to relatives and friends of the time and place of the detainee's next court appearance. Id. The district court ordered an end to such overbroad mail restrictions. Id. at 1167-68. Similarly, in Vest v. Lubbock County Commissioners, 444 F.Supp. 824 (N.D. Tex. 1977), detainees were limited to three pages per letter and six incoming and outgoing letters per week. The rule was concededly devised solely to reduce the amount of time needed for guards to read the mail; the guards were required to read all mail,



and could refuse to mail or deliver any letter containing language they deemed "abusive." Id. at 828-29.[2/]

Restrictive practices also have been revealed in cases dealing with visiting. In Manicone v. Cleary, No. 74 C 575 (E.D.N.Y. June 30, 1975), the warden had prohibited children from visiting their fathers on the ground that such visits would have a disturbing effect upon the children. The district court invalidated the rule, noting that

---

2/ See also, e.g., Owens-El v. Robinson, 442 F.Supp. 1368, 1387 (W.D. Pa. 1978) (limit of one page per letter on all outgoing non-legal mail); Marion County Jail Inmates v. Broderick, No. IP 72-C-424 (S.D. Ind., March 24, 1976) (limit of one outgoing letter per day; each letter limited to one piece of paper; letters to be written only on stationary purchased from the jail's commissary); Barnes v. Government of the Virgin Islands, 415 F.Supp. 1218, 1234 (D. V.I. 1976) (limits on number and length of letters); Collins v. Schoonfield, supra, 344 F.Supp. at 276 (D. Md. 1972) (warden intercepted, failed to deliver, and photocopied correspondence of inmates with courts, attorneys and public officials as well as with family and friends); Conklin v. Hancock, 334 F.Supp. 1119, 1122 (D.N.H. 1971) (detainee's letters may not be held up merely because they are critical of the warden, since "critical or even insulting letters would not present a clear and present danger to prison security").

prolonged separation from a parent is also harmful to a child and that the decision to bring a child to the jail "is better made by the detainee and his family than by an arbitrary jail regulation." Slip. op. at 29.[3/]

Foremost among the concerns of local jailers, of course, is the fear that a detainee may try to escape. While that concern is obviously a legitimate one, some of the security restrictions imposed in this cause have bordered on the ludicrous. For example, in Owens-El v. Robinson, 442 F.Supp. 1367 (W.D. Pa. 1978), all detainees at the Allegheny County Jail in Pittsburgh had for several years been totally deprived of bed sheets, "for security reasons." 442 F.Supp. at 1377. The warden began distributing sheets just before the case went to trial, although the record revealed that they were still in short supply. Id. at 1378.

---

3/ Other jailers, in their "expertise," have found it necessary to keep children from their parents. The courts have disagreed, invalidating such practices. See, e.g., Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976); Goldsby v. Carnes, 429 F.Supp. 370, 378 (W.D. Mo. 1977), prior opinion, 365 F.Supp. 395, 415 (W.D. Mo. 1973)(consent order); O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582, 599 (E.D. Mich. 1977); Miller v. Carson, No. 74-382 Civ.J-5 at 15 (M.D. Fla. Jan. 31, 1975 (preliminary injunction), aff'd, 563 F.2d 741, 748 (5th Cir. 1977); Brenneman v. Madigan, 343 F.Supp. 128, 141 (N.D. Cal. 1972); Jones v. Wittenberg, 330 F.Supp. 707, 717 (N.D. Ohio 1971); Powlowski v. Wullich, 81 Misc.2d 895, 901 (Sup. Ct. Monroe County 1975). Other cases invalidating unreasonable restrictions on who may visit a detainee include: Brenneman, supra, (limit of five persons to each detainee's list of visitors); Marion County Jail, supra, at 7 (limit of three persons to each detainee's visiting list; limit of two visitors per week). Even visits by attorneys have been the subject of severe restrictions. See, e.g., Manicone v. Cleary, supra.



The district court required the warden to provide a clean change of linen weekly. Order of Jan. 4, 1967, ¶7.

In Bundy v. Katsaris, TCA 78-0913 (N.D. Fla. Nov. 1, 1978), a high escape-risk detainee, accorded outdoor recreation less than once a month on a 40 square foot rooftop surrounded by a ten-foot high fence topped with barbed wire, was nonetheless fitted during the recreation periods with chains about his waist and wrists, and with metal leg braces to prevent his knees from flexing. The overall effect was to render the de-

tainee "practically immobile." Slip. op. at 3. The district court, observing that the presense of guards should be sufficient to prevent escape from the fenced rooftop, ordered the leg braces and chains removed and required the warden to accord the detainee one hour of daily outdoor recreation. Id. at 12.

In O'Bryan v. County of Saginaw, 437 F.Supp. 582 (E.D. Mich. 1977), the warden deemed it necessary for security to prevent all detainees with bail of more than $5000 from attending religious services. The district court enjoined the practice as violative of the First and Fourteenth Amendment rights of the unconvicted persons. Id. at 600. See also Wilson v. Beame, 380 F.Supp. 1232 (E.D.N.Y. 1974) (detainees in administrative segregation denied access to religious services, even though the chapel was a secure area eleven flights above the ground and the presence of additional officers was sufficient to guard against escape).

Overzealousness in the name of security has also led to severe treatment of detaineees in need of medical attention. Thus, in Miller v. Carson,



401 F.Supp. 835, 878 (M.D. Fla. 1975), aff'd, 563 F.2d 741 (5th Cir. 1977), every detainee taken to the hospital was kept continuously chained to the hospital bed regardless of his ailment or the seriousness of the charges pending against him. Similarly, in Campbell v. McGruder, 416 F.Supp. 100, 104 (D.D.C. 1975), aff'd and remanded, 580 F.3d 521, 551 (D.C. Cir. 1978), handcuffs and leg irons were used to shackle some detainees to beds; the district court observed one inmate entering his third consecutive week under such restraint. And in Collins v. Schoonfield, supra, 344 F.Supp. at 278, detainees suffering epileptic seizures, delerium tremens and mental disorders, as well as those who had attempted suicide or were undergoing withdrawal from narcotic addition, were routinely shackled with iron and other metal restraints in the jail infirmary; several detainees bore scars on their wrists and legs as a result of such treatment.

C.

Centuries ago, Blackstone observed that during the "dubious interval" between arrest and conviction,

> a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only ...

4 W. Blackstone, Commentaries 300. But Blackstone also despaired that jailers would not heed this caution. Id.

At issue in this case are not the physical conditions of the new Metropolitan Correctional Center, but the manner in which that jail is operated to impose "needless fetters" upon unconvicted citizens. One district court prophetically observed that

> if a beautiful brand new jail were built, and operated the way the present jail is operated, there would be little improvement in the difficulties at first, and what improvement there was would very rapidly disappear.

Jones v. Wittenberg, 330 F.Supp. 707, 712 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). Here we have a "brand new jail," but one which is operated in an unduly restrictive manner. Detainees are crammed two to a cell, where they must urinate and defecate in the close physical presence of one another. They are forced to undergo humiliating body cavity searches, accompanied by sadistic and abusive remarks of the guards, even though less



intrusive security measures would suffice. They may not observe the searching of their cells, even though the officers have been known to mishandle their limited collection of personal property. They may not receive packages from home, even though many other correctional systems routinely permit receipt of such packages without incident. And, until the Bureau of Prisons abandoned for the most part the "publisher only" rule (Brief for Petitioners, p. 69), they could not receive books or magazines from home despite nearly a score of court decisions which have invalidated that retriction throughout the country without untoward results.4/

Petitioners ask this Court to approve these restrictions by blind deference to the fiat of jailers, in the name of "security." but "almost any deprivation can be explained or defended by the justification that it improves the security of a jail or prison." Feeley v. Sampson, 570 F.2d 364, 380 (1st Cir. 1978) (Coffin, C.J.,

---

4/ The latter two practices are particularly onerous for impecunious detainees who often cannot afford to purchase items from the commissary or new books from publishers and bookstores.

dissenting). Especially where the restrictions in question have been successfully abandoned at numerous other facilities without adverse consequence, courts "should reject the unsubstantiated view of prison authorities that [a] privilege is a security risk." Id.[5/]

In fact, the practices enjoined in this case are no more necessary to security than those found to be unreasonable in the cases discussed above. This "necessity" results solely from the reluctance of the jailer to adopt procedures that are less convenient for him. Packages can be inspected before their contents are handed over to detainees. Visiting can be made secure by vigilent monitoring of the visit -- which already takes place in full view of institutional officials, United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 147 (S.D.N.Y. 1977) -- combined with careful searches of visitors and the extensive strip searches of the detainee approved by the district court. Id. at 148. These surely

---

5/ Although Chief Judge Coffin's words were written in dissent, they reflect the view of a majority of the three active judges of the First Circuit. Circuit Judge Bownes was not a member of the Feeley panel because he had decided the case as a district judge.



suffice to render unnecessary routine use of dehumanizing anal, vaginal, and testicle searches. Cells can be examined respectfully yet thoroughly without barring the detainee from observing. And, as petitioners now concede, most publications can be safely allowed into the jail regardless of their source.[6/]

Nor should this Court be deterred by the notion that, although the restrictions enjoined below are undesirable, petitioners should not be required to abandon them as a matter of constitutional law. The history of jail reform efforts

---

6/ The Bureau's reluctance until this late date to modify the "publishers only" rule with respect to paperback books is a prime example of undue emphasis upon administrative concerns. Obviously, a book can be carefully inspected before it is given to the detainee. It should come as no surprise that many of the jailers whose practices were enjoined in the cases cited above were also strong adherents to the "publishers only" rule, and that they abandoned that restriction only by court order. See Collins v. Schoonfield, supra, 344 F.Supp. at 281; Inmates of Milwaukee County Jail v. Peterson, supra, 353 F.Supp. at 1168-69; Funchess v. Beame, supra; Miller v. Carson, supra, Order and Preliminary Injunction at 15 (Jan. 31, 1975); Manicone v. Cleary, supra, Slip. op. at 44-48; Marion County Jail Inmates v. Broderisk, supra, Slip. op. at 7, 15; Owens-El v. Robinson, supra, 442 F.Supp. at 1487-88; O'Bryan v. County of Saginaw, Mich., supra, 437 F.Supp. at 600.

in recent years is replete with instances of unheeded administrative proposals, draft standards and grand jury reports. See, e.g., Jones v. Wittenberg, supra, 323 F.Supp. 93, 97 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854, 855-56 (6th Cir. 1972) (reports of several grand juries, professional groups and civic groups ignored); Inmates of the Suffolk County Jail v. Eisenstadt, supra, 360 F.Supp. at 681 (D. Mass. 1973) (seven separate governmental reports unimplemented for over a quarter of a century); Rhem v. Malcolm, 371 F.Supp. 594, 604, 607, 609, 616 (S.D.N.Y. 1974), aff'd, 507 F.2d 333 (2d Cir. 1974) (city failed to adopt numerous recommendations of its own Board of Correction and Environmental Protection Agency, and of State legislative committee); Benjamin v. Malcolm, 75 Civ. 3073 (S.D.N.Y. January 6, 1976), Slip. op. at 3 (major riot caused by overcrowding after city once again ignored warnings of Board of Correction; court ordered swift end to double celling). In this very case, we are told that the much-heralded Draft Federal Standards for Corrections, which support



respondents' position on nearly every issue,[7/] are merely "liberal administrative goals" which should not reflect upon the rationality or necessity of petitioner's restrictive practices. (Brief for Petitioners, p. 55 n.43.).

The practices condemned in this case are degrading, humiliating and totally unnecessary. In the case of unconvicted pretrial detainees, "the orphans of criminal jurisprudence," Inmates of the Suffolk County Jail v. Eisenstadt, supra, 360 F.Supp. at 688, that alone should be sufficient to render the practices unconstitutional. As this Court has held,

> a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims.... When a prison regulation or practice offends a fundamental consitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

Procunier v. Martinez, 416 U.S. 396, 405 (1974).

---

7/ See discussion, infra, n.17 & accompanying text & n.18.

ARGUMENT

POINT II

THE FEDERAL COURTS HAVE INHERENT POWER TO CORRECT THE CONDITIONS UNDER WHICH PERSONS AWAITING TRIAL IN THE FEDERAL COURTS ARE DETAINED

As noted above, the courts below properly declined to defer to the "expertise" of the warders of this Nation's jails. In doing so, they relied on constitutional principles. But the rulings below are equally well sustained on other, non-constitutional grounds.[8/] As the trial judge aptly noted United States ex rel. Wolfish v. United States, 428 F.Supp. 333, 340 (S.D.N.Y. 1977), the federal character of the Metropolitan

---

8/ It is settled practice to avoid a decision of a constitutional issue if a case can be fairly decided on another ground.

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.

Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944), cited in University of California Regents v. Bakke, 438 U.S. ____, 57 L.Ed.2d 750, 847, 98 S. Ct. 2733, ____ (1978) (Opinion of Stevens, J.).



Correctional Center ("MCC") puts this case in a different posture than the many cases dealing with similar practices in state pre-trial detention facilities.[9/] Inmates at the MCC, which is actually connected to the courthouse, are, for the most part, confined there by order of federal district court judges.[10/] Thus, this case poses the "still surprising open" question:

---

9/ At the very least, the strong notions of federalism that are brought into play in cases where the federal courts are dealing with state prisons and pre-trial facilities, see, e.g., Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 126 (1977); Procunier v. Martinez, 416 U.S. 396, 405 (1974), are not relevant to this case.

10/ This distinguishes the instant case from prior cases dealing with practices in federal prisons. The statute specifically provides that: "A person convicted of an offense against the United States shall be committed ... to the custody of the Attorney General of the United States...." 18 U.S.C. §4082(a) (1976). Thus, when dealing with issues regarding the conditions of confinement of convicted persons, the courts properly display some measure of deference to the discretion of the executive branch of government. This case, however, involves pre-trial detainees. They are not consigned by statute to the custody of the Attorney General. Compare 18 U.S.C. §§4001(b)(1) & 4042(1) & (2) (1976) with §4082(a). They are there solely pursuant to the decisions of federal judges regarding commitment and admission to bail.

> whether a federal court, confronted by demands for fair treatment from "its own" inmates, may not in such a case shoulder greater responsibilities or, to put it less demurely, exercise greater powers.

United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 121 (S.D.N.Y. 1977). It is respectfully submitted that the federal courts do possess such inherent power to correct the conditions of confinement for persons whom those very same courts have detained. Such power extends beyond solely enforcing constitutional minima, but rather encompasses the power to correct unreasonable federal detention practices.

From the time that a person charged with a federal crime is first brought before a federal judicial officer, he is subject to the jurisdiction of the federal courts. See Miller v. United States, 6 F.2d 463 (3d Cir. 1925). Control over a defendant during the period between his first appearance and trial has long been held to be a concomitant of the court's power and authority over the case. Thus, it has been said that the power to admit to bail "is incident to the power to hear and determine or to commit," Berkowitz v. United States, 90 F.2d 881, 883 (8th Cir.



1937), and "inherent at the common law." Ewing v. United States, 240 F. 241, 248 (6th Cir. 1917) and cases cited therein. See also, Barth v. Clise, 79 U.S. (12 Wall.) 400, 402 (1871). Although the power to admit to bail was first conferred by the Judiciary Act of 1789, the courts have relied upon this residuum of inherent power in granting bail in cases falling in the interstices of statutes and rules, see Berkowitz, supra, and in cases where the statutes are wholly silent. When the issue was first raised in this Court seventy-five years ago with regard to the power of federal courts to grant bail to persons awaiting extradition, it stated:

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute....

Wright v. Henkel, 190 U.S. 40, 63 (1903). Later cases have so held. See, e.g., In re Gannon, 27 F.2d 362 (E.D. Pa. 1928). Similarly, the general weight of authority is that in habeas corpus proceedings federal courts have inherent power to grant bail. Johnston v. Marsh, 227 F.2d 528 (3rd Cir. 1955); Principe v. Ault, 62 F.Supp. 279 (N.D. Ohio 1945) (deportation) and cases cited therein. But see Bongiovanni v. Ward, 50 F.Supp. 3 (D.

Mass. 1943)(deportation). In habeas too, the court's power to admit to bail is based on

> the fact that there is a prisoner before him over whom he has jurisdiction and where his power to act judicially is expressly conferred by statute. That being so, he had the authority which a court has with regard to such a case.... In other words, a court has very wide authority over persons and business before it. [footnotes omitted].

Johnston, supra, 227 F.2d at 530.11/

---

11/ This notion of inherent power is not in conflict with the principle that the inferior federal courts are courts of limited jurisdiction. As noted by the court in Johnston:

> The statement is often made that the inferior courts of the United States are courts of limited jurisdiction. This is a truism in one sense. The courts are competent to act in such cases, and only such cases, as the Congress, pursuant to the Constitution, assigns to them. And unless constitutional provisions stand in the way, the assignment may be varied at the will of Congress. But within the area of activity assigned to them, Federal courts are courts of full stature, and we may rightly look to common law concepts and precedents to see the scope of the implied or "inherent" authority which the judicial office carries with it.



The inherent power of courts to act upon persons brought within their jurisdiction has been recognized in other contexts as well. The power of a court to admit a person to bail is not spent once a decision to admit or remand is made. The courts are further empowered to affect and control the behavior of the bailee, still within its

---

11/ Cont'd.

Johnston v. Marsh, 227 F.2d 528, 530 (3rd Cir. 1955), citing In re Gannon, supra, 27 F.2d 362 (E.D. Pa. 1928). In Gannon, the court expressed it thus:

> The "judicial power" is conferred by the Constitution upon the courts of the United States. The framers of the Constitution were familiar with common-law concepts and the words and phrases employed by common-law lawyers. The words chosed are "courts" and "judicial power." Whatever else may be said of the jurisdictional authority (in the power sense) of the judiciary, the meaning of the words and phrases used must be sought for in the literature of what we call the common-law. Courts cannot function without the use of process....

Id. at 363.

Here, the district court was exercising only statutorily granted jurisdiction; it was sitting to hear a petition for a writ of habeas corpus. 28 U.S.C. §2241 (1976).

jurisdiction, by placing conditions on his bail. Today this is done pursuant to specific statutory authority. 18 U.S.C. §3146(a) (1976). However, as noted by one court of appeals in upholding the constitutionality of §3146, there is little doubt that

> the course of the common law in England and the development of the common law and statutory law in the United States demonstrate that the courts have the inherent power to place restrictive conditions upon the granting of bail.

United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971). And, by rule, this Court has recognized the existence of the courts' power over the individual during the pre-trial period even while detained. Fed. R.Crim.P. 46(g) provides that:

> The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating unnecessary detention.

Thus, it is well established that the courts have extensive authority, both statutory and inherent, over persons within their jurisdiction either awaiting trial or on writ of habeas corpus. This power is best typified by the power to admit to bail or to condition bail. But the power to admit to bail, if not the stepchild of the power



to commit (see Berkowitz, supra), is no more than the flip side of that power. Both the power to commit and the power to grant bail proceed from the authority of the court over the person within its jurisdiction; both powers are exercised for the same purpose:

> [T]he court must enforce the attendance of the prisoner in some way, and we see no difference (again in the power sense) between one form of compulsion and another. The only difference is, as we have said, that one form acts upon his body; the other upon his will.

In re Gannon, supra, 27 F.2d at 363. Both powers affect the defendant awaiting trial in the same way. Conditions at a detention facility are to the detainee what bail conditions are to those at liberty pending trial; both affect liberty of movement and quality of life. Thus, the power to commit a defendant, and to place conditions upon his confinement, must be equally broad and similarly based.

In sum, the district courts, having jurisdiction over the person of the accused, have the power inherent in that authority to control his disposition pending trial. They may admit him to bail; they may allow bail on conditions. They

may bail him during the daytime, remanding him into custody at night. See 18 U.S.C. §3146(a)(5) (1976). They may remand him into custody pending trial; they may commit him with conditions. Given that, it is, at the very least, anamolous to say that they cannot act to correct conditions of confinement that are intolerable or unduly restrictive.12/

Put another way, pre-trial detainees are in confinement pursuant to the process of the district court, pursuant to its specific order of commitment or its order of commitment if the defendant fails to make bail or observe its conditions. This Court has long recognized that federal courts have inherent authority to police those federal agents that act pursuant to its process. Thus, in Rea v. United States, 350 U.S. 214 (1956), this Court held that when a federal agent obtained a search warrant in violation of the requirements of Fed.R.Crim.P. 41, the district court had inherent authority to enjoin the agent from testifying in state court about the contraband he found pursuant to that warrant. The Court held that the federal agent, having committed an "abuse of process issued by a United States Commissioner ...," was subject to the "supervisory powers over federal law enforcement agencies." Id. at 216-217. Similarly, in Wise v. Henkel, 220 U.S. 556 (1911), this Court relied on a federal court's inherent authority to police the execution of its processes. There, a district attorney was ordered to return certain books and papers to the owners. These items had been seized in the course of an arrest made pursuant to

---

12/ Any other conclusion would lead to results that could often be as undesirable as they are anamolous. Since federal judges have unquestioned power to dispose of defendants prior to trial in the various ways just enumerated in the text, a federal judge who found the conditions of pre-trial detention in his district intolerable could in effect regulate those conditions through his power to bail or commit. He could condition his commitment orders or, in the alternative, grant lower bail.

Recognizing the inherent power of the district courts to directly rule on the conditions of pre-trial detention as in a case like this one has the obvious advantages of manageability, uniformity of result, and reviewability.

a federal warrant. The district attorney refused and was jailed for contempt. His writ of habeas corpus was discharged; he appealed to the Supreme Court. This Court held that it had no jurisdiction to hear the appeal because, under §5 of the Judiciary Act of 1891, it only had jurisdiction to hear the appeal if it concerned a question "involving the construction or application of the Constitution of the United States." Here, it ruled, the district attorney's confinement was not as a result of the district court's ruling on a constitutional issue. Rather, the power of the district court to order the return of the items seized was

> wholly irrespective of whether there was a constitutional right to exact the return of the books and papers. That is to say, it was within the power of the court to take jurisdiction of the subject of the return, and pass upon it, as a result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court.

Id. at 558.13/

---

13/ As has been recently reemphasized, similar power is legislatively conferred. In United States v. New York Telephone Co., 434 U.S. 159 (1977), it was noted that:



Here too, the power of the district court to order the discontinuation of the intolerable practices at issue in this case is "wholly irrespective of whether there [is] a constitutional right to exact" such changes. Here, as in Wise, it was within the power of the district court to take jurisdiction over the detainees confined to the MCC pursuant to judicial process and pass on the "unreasonable exertion of authority" represented by the practices that it found to induce "threat, nausea, and degradation .... foul odors, social stigma, humiliation and denials of minimal privacy....," 428 F.Supp. at

---

13/ Cont'd.

> This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.

Id. at 172. The Court futher noted that the Act is a "legislatively approved source of procedural instruments designed to achieve the 'rational ends of law....,'" and that the court may use such writs in aid of its jurisdiction "when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." Id. at 172-173. (citations omitted).

339 (double celling); to be "a vital source of tension and hostility ...," "a blunt oppression...," and a violation of even "minimal dignity ...," 439 F.Supp. at 149 (searches performed without the presence of the detainee); and to be "unpleasant, embarrassing, and humiliating ... plung[ing] the reaction to a level of deep degradation and submission ...," as well as ineffective. 439 F.Supp. at 146-147 (body cavity searches). More unreasonable exertions of authority by federal law enforcement personnel -- pre-trial detainees being in the immediate custody of the Bureau of Prisons acting for the Attorney General, 18 U.S.C §§4001 & 4042 (1976) -- in connection with the execution of the process of the court could hardly be imagined, nor the inherent authority of the district court to act more plainly put.

---

13/ Cont'd.

In New York Telephone, supra, the Court held that federal courts can compel third parties to aid in the implementation of the process previously issued by the court. Here, the question is only one of the court's power to restrain federal agents in the overzealous execution of the courts' commitment orders.



In the instant case, the authority of the court is more firmly based than in Wise. The class of petitioners in the suit before the district court are, for the most part, pre-trial detainees still within the jurisdict on and power of the United States District Court for the Southern District of New York. Since this action was commenced and maintained on a writ of habeas corpus, Wolfish v. Levi, 573 F.2d 118, 122 (2d Cir. 1978), the petitioners were also within the jurisdiction of the district court sitting to decide the petition. The authority this power over the body of the petitioner comprehends, includes more than just the power to release the prisoner or remand him, or to admit him to bail pending that decision. It also includes the power

> to dispose of the party "as law and justice require." [28 U.S.C. §2243 (1976)]. The Judge is not limited to a simple remand or discharge of the prisoner, but he may remand with directions that the prisoner's retained civil rights be respected....

Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944). Thus, the district court sitting as a habeas court could inquire into and redress claims concerning conditions of confinement. Johnson v.

Avery, 393 U.S 483 (1969); Williams v. Richardson, 481 F.2d 358 (8th Cir. 1973); Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972); Armstrong v. Cardwell, 457 F.2d 34 (6th Cir. 1972); Coffin, supra.[14/] And, it was not limited to dealing with only

---

14/ But see Perez, v. Turner, 462 F.2d 1056 (10th Cir.1972), cert. denied, 410 U.S. 944 (1973). Perez presented a habeas challenge to the conditions of his confinement. The court held that it could not release a dangerous criminal because of the conditions of his confinement. See generally, Developments in the Law: Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970).

Several state courts, following Coffin's lead, have indicated that state habeas corpus procedures are available to challenge conditions of confinement. In re Riddle, 57 Cal.2d 848, 372 P.2d 316, 22 Cal.R. 472, cert. denied, 371 U.S. 914 (1962); In re Jones, 57 Cal.2d 860, 372 P.2d 310, 22 Cal.R. 478 (1962); Mehafey v. State, 87 Idaho 228, 392 P.2d 279 (1964); Lavier v. Kansas, 209 Kan. 442, 497 P.2d 265 (1972); Comm. ex rel. Bryant v. Hendricks, 144 Pa. 83, 280 A.2d 110 (1971); State ex rel. Cole v. Tahash, 269 Minn. 1, 129 N.W.2d 903 (1964); Rogers v. Warden, Nevada State Prison, 84 Nev. 534, 445 P.2d 28 (1968); People ex rel. Brown v. Johnson, 9 N.Y.2d 482, 215 N.Y.S.2d 44, 174 N.E.2d 725 (1961); Grinfell v. Gladden, 241 Ore. 190, 405 P.2d 532 (1965), cert. denied, 382 U.S. 988 (1966); Hughes v. Turner, 14 U.2d 128, 378 P.2d 888 (1963); State ex rel. Pingley v. Coiner, ____ W. Va. ____, 186 S.E.2d 220 (1972). Contra, Saia v. Warden of Conn. State Prison, 25 Conn.Sup. 549, 209 A.2d 520 (1964); State v. McCray, 267 Md. 111, 297 A.2d 265 (1972).



constitutional claims. Unlike a petition for a writ of habeas corpus made by a state prisoner, a petititon from a federal prisoner need not raise federal constitutional or statutory issues. Compare 28 U.S.C. §2254(a) with §2241 (C) (1) & (2) (1976). Thus, upon habeas from federal custody, the court may "dispose of the matter as law and justice require." 28 U.S.C. §2243 (1976).

Here, then, the authority of a federal criminal court, of a court acting upon a petition for a writ of habeas corpus, and of a court to police the execution of its processes forms a unique coalescence. Thus, for all these reasons, the inherent authority so clearly recognized by this Court in Wise, is, in this case, even more firmly based. As in Wise, "wholly irrespective" of the constitutional issue, the rulings of the courts below striking down "unreasonable exertion[s] of authority" should be affirmed.

## POINT III

### THE PRACTICES OF THE MCC AT ISSUE IN THIS CASE WERE PROPERLY ENJOINED SINCE THEY VIOLATED THE DEFENDANTS' STATUTORY DUTY TO "PROVIDE SUITABLE QUARTERS" FOR PRE-TRIAL DETAINEES

The Attorney General is charged with the management and control of all Federal correc-

tional and penal institutions and has an affirmative duty to "promulgate rules for the government thereof." 18 U.S.C. §4001(b)(1) (1976). Under his direction, the Bureau of Prisons is charged with the direct management of such institutions and with the duty to "provide suitable quarters ... for ... all persons charged with or convicted of offenses against the United States." 18 U.S.C. §4042(1) & (2) (1976). These duties provide sound statutory grounds for affirming the rulings below. The findings made by the district court judge amply support the conclusion that the conditions at and the practices of the MCC do not comport with the duty of the Bureau as the agent of the Attorney General to provide suitable quarters for pre-trial detainees.

Although all of the issues presented on this appeal were decided on constitutional grounds, the statutory issue was raised below. The district court discussed both the statutory duties noted above and the reviewability of the Bureau's decisions and practices generally under the Administrative Procedure Act under the "arbitrary and



capricious" standard of 5 U.S.C. §706 (1976). United States ex rel Wolfish v. Levi, 439 F.Supp. 114, 122-124 (S.D.N.Y. 1977). The district court further noted that: "What is 'arbitrary', 'capricious,' ... may at once, and indistinguishably, violate constitutional as well as statutory rights." Id. at 124. Accordingly, it only explicitly relied on statutory grounds on a few minor issues, not here on review, that the court of appeals characterized as "administrative matters ... committed to agency discretion." Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978). Thus, neither of the courts below discussed the possible statutory bases for the rulings now before this Court.

The court of appeals did not decide the question whether actions of the Bureau of Prisons are reviewable under the Administrative Procedure Act. Id. at 125.[15/] However, it is immaterial whether the statutory issue be reached by way of the APA; by way of implying a right from the

---

15/ Indeed, there is contradictory authority on this issue. Compare Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975), with Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976).

statutes themselves, as suggested by the district court, 439 F.Supp. at 122 (citing J. I Case v. Borak, 377 U.S. 426 (1964); or by way of the court's responsibility, in ruling on the petition for a writ of habeas corpus, to look to the relevant statutory provision in order to "dispose of the matter as law and justice require." 28 U.S.C. §2243 (1976). Under any theory, then, the statutory issue must be reached, and it provides a sound basis for the rulings below.

Even if it is assumed, arguendo, that the determination of what are suitable quarters is itself consigned to the discretion of the Attorney General, Cf. Morgan v. Willingham, 424 F.2d 200, 201 (10th Cir. 1970) (convicted prisoners),[16] the court's rulings would still be sustainable on statutory grounds.

Under the direction of the Attorney General, a Department of Justice Task Force has prepared a set of Draft Federal Standards for Corrections. These standards represent the result of a year long process participated in by representatives

---

16/ But see discussion, supra, n.10.



of the Bureau, the LEAA, and other divisions of the Justice Department. The preface to the standards declares that they "provide guidelines for the decent and humane operation of our country's corrections and detention facilities..." and that:

> [I]t is the intention of the Department of Justice to use these standards as a basis for evaluating its own correctional programs and policies ... [and] to ask the Director of the Bureau of Prisons to submit a plan, which delineates each standard that is not currently met, the resources and steps which will be necessary to meet it, and a reasonable timetable for its accomplishment.

Federal Standards for Corrections [Draft], U.S. Department of Justice at 2. These standards specifically prohibit the practices at issue in this case: double-celling, routine body cavity searches, the publisher only rule, and the ban on packages.[17]

---

17/ The relevant sections provide:

PHYSICAL PLANT

002 All cells and detention rooms rated for single occupancy house only one inmate. [emphasis added].

If these standards had been adopted, there would be little doubt that the Attorney General

---

17/ Cont'd.

> 004 Single rooms or cells have at least 60 square feet of floor space. Where inmates spend more than 10 hours per day in the room or cell, there is at least 70 square feet of floor space in detention facilities .... [emphasis in original].
>
> 005 Multiple occupancy cells house no more than 16 inmates, with a minimum of 60 square feet of floor space per inmate in the sleeping area (excluding activity spaces). [emphasis added].
>
> SECURITY AND CONTROL
>
> 013 ...Whenever body searches are required, staff personnel avoid unnecessary force and strive to preserve the dignity and integrity of the inmate.
>
> Discussion: The facility's search plans and procedures should include:
>
> ....
>
> Equally important, the search plan should include:



should be bound by them. Cf. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Even when agency

---

17/ Cont'd.

> Use of nonintrusive sensors and other techniques instead of body searches whenever feasible;
>
> Manual or instrument inspection of body cavities only where there is probable cause and where authorized by the chief executive officer, conducted by a medically trained person;
>
> Visual inspection of body cavities, only where there is real suspicion, conducted by trained staff in an area within the facility designed to assure the greatest possible privacy to the inmate. Real suspicion may be created ... by the surrounding circumstances -- for example, ... any re-entry into general population in a secure facility from a visiting room where there is contact visiting that is not constantly monitored ... [emphasis added]
>
> MAIL AND VISITING
>
> 002 There is no limit on the volume of mail an inmate may send or receive, or on the length, language, content or source of such mail or publica-

determinations are not yet made official regulations but are intended to be binding on subsidiary agencies they may be enforced by the courts. See Thorpe v. Housing Authority of

---

17/ Cont'd.

> tions, except where there is clear and convincing evidence to justify such limitations. [emphasis added].
>
> Discussion: Inmates may receive books and other publications from sources other than publishers. Such correspondence, as well as other packages, are subject to all searches and inspection requirements. [emphasis added].

Draft Standards at 10, 36-37, 63.

The double bunking of pre-trial detainees in rooms of 75 square feet designed for one, obviously violates the above quoted standards. Similarly, the standards specifically reject the publisher only rule and envision the receipt of packages. The conduct of routine body cavity searches after visits where "the inmates and their visitors are in full view during the visits and fully clad...," United States ex rel. Wolfish, v. Levi, 439 F.Supp. 114, 147 (S.D.N.Y. 1977), would also violate the above standards. It should be noted that the court of appeals upheld the MCC regulation requiring inmates to wear govern-



Durham, 393 U.S. 268 (1969). Awaiting adoption,[18] these standards still express the

---

17/ Cont'd.

ment issued jumpsuits. Wolfish v. Levi, 573 F.2d 118, 132-133 (2d Cir. 1978). In McGoff v. Rapone, 78 F.R.D. 8 (E.D. Pa. 1978), the court, based on expert testimony, found that the use of jumpsuits "would reduce greatly the chance of prisoners carrying weapons ... as well as facilitate the detection of contraband." Id. at 17. There is testimony in the record in this case that the use of jumpsuits makes it difficult if not impossible to secrete contraband in the anus. (App. 45).

18/ In all candor, it should be noted that the pendency of this appeal is probably related to the delay in the adoption of these standards. It has been reported that:

> Justice Depatment official are being curiously mute about the current status of the correctional standards they proposed last spring....
>
> One complicating factor is that the department is defending itself in a law suit (Bell v. Wolfish) against the federal Metropolitan Correctional Center in New York City. In a writ for appeal of federal Judge Marvin Frankel's decision in that case the department seemed to argue against some of the very requirements included in its own draft standards.

considered opinion of the Attorney General and his staff, after a year of study, on exactly what are "suitable quarters" for convicted prisoners and pre-trial detainees. Thus, even if the determination of what are suitable quarters were wholly within the discretion of the Attorney General, he has already expressed his expert determination. No more extensive or considered procedure is in the offing. In Gulf States Utilities v. Federal Power Commission, 411 U.S. 747 (1973), the Court remanded for reconsideration the Federal Power Commission's decision to allow a public utility to issue certain bonds. The Court held that in exercising its expertise in ruling that the bond issue was in "the public interest" under §204 of the Federal Power Act, 16 U.S.C. §824c (1976), the FPC was required to consider the "fundamental national economic policy" expressed in another statute, the antitrust laws. Id. at 759. Here, in considering the exercise of the Attorney General's discretion and expertise in determining what are "suitable quarters," the Court need only look to the Attorney General's own expressions and determinations.

---

18/ Cont'd.

Criminal Justice Newsletter, Vol. 9, No. 23, at 4 (Nov. 20, 1978).

## CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
BETH J. LIEF
STEVEN L. WINTER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

Supreme Court, U. S.
FILED
DEC 22 1978
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1829

GRIFFIN B. BELL, *et al.*,
*Petitioners,*

v.

LOUIS WOLFISH, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AS AMICUS CURIAE

EDWARD I. KOREN
RALPH I. KNOWLES, JR.
MATTHEW L. MYERS
ALVIN J. BRONSTEIN
National Prison Project
American Civil Liberties Union
Foundation
1346 Connecticut Avenue, N.W.
Suite 1031
Washington, D.C. 20036
(202) 331-0500

*Attorneys for Amicus Curiae*

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF INTEREST | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 5 |
| I. THE UNITED STATES' POSITION IN THIS CASE IGNORES THE HISTORICAL AND LEGAL DEVELOPMENTS WITH RESPECT TO THE STANDARD OF REVIEW OF THE CONDITIONS OF CONFINEMENT OF PRE-TRIAL DETAINEES OVER THE LAST DECADE | 5 |
| A. The Background to Litigation Involving the Conditions of Confinement of Pre-Trial Detention | 6 |
| B. From Legal Developments During the Last Decade Has Emerged the Recognition of a Standard to Determine the Constitutional Adequacy of Conditions of Confinement for Pre-Trial Detainees | 10 |
| C. The Results of these Legal Developments Have Been Encouraging and this Court Should Not Impede Those Efforts Prematurely | 16 |
| II. THE OPINION AND JUDGMENT OF THE SECOND CIRCUIT COURT OF APPEALS PROVIDE NO SPECIAL AND IMPORTANT REASONS FOR REVIEW BY THIS COURT AS REQUIRED BY RULE 19 AND THE WRIT OF CERTIORARI SHOULD THEREFORE BE DISMISSED AS IMPROVIDENTLY GRANTED | 22 |

A. The Standard of Review Recognized by the Court of Appeals Is Deeply Rooted in American Jurisprudence And Is Recognized By Other Courts . . . . . 22

B. The Specific Holdings of the Court Below Challenged by the Government Are Consistent With All Recognized Professional Standards And This Is Not An Appropriate Case In Which To Challenge The Constitutional Standard To Be Applied to Conditions of Confinement for Pre-Trial Detainees . . . . . 28

CONCLUSION . . . . . 36

**CITATIONS**

**Cases:**

Ahrens v. Thomas,
434 F.Supp. 873 (W.D. Mo. 1977),
*aff'd*, 570 F.2d 286 (8th Cir. 1978) . . . . . 13

Anderson v. Nosser,
438 F.2d 183 (5th Cir. 1971) . . . . . 35

Battle v. Anderson,
376 F.Supp. 402 (E.D.Okla. 1974),
*aff'd*, 564 F.2d 388 (10th Cir. 1977) . . . . . 2, 3, 26, 33, 34

Bono v. Saxbe,
450 F.Supp. 934 (E.D.Ill. 1978) . . . . . 2

Bounds v. Smith,
430 U.S. 817 (1977) . . . . . 12, 21

Brenneman v. Madigan,
343 F. Supp. 128 (N.D.Cal. 1972) . . . . . 14



Campbell v. McGruder,
416 F. Supp. 100 (D.D.C. 1975),
*aff'd*, 580 F.2d 521 (D.C.Cir. 1978) . . . . . 14, 24, 25

Clonce v. Richardson,
379 F.Supp. 338 (W.D.Mo. 1974) . . . . . 2

Coffin v. United States,
156 U.S. 432 (1895) . . . . . 12

Collins v. Schoonfield,
344 F.Supp. 257 (D.Md. 1972) . . . . . 18

Conklin v. Hancock,
334 F.Supp. 1119 (D.N.H. 1971) . . . . . 27

Cooper v. Pate,
378 U.S. 546 (1964) . . . . . 9

Costello v. Wainright,
397 F. Supp. 20 (M.D. Fla. 1975),
*rev'd on other grounds*, 539 F.2d 547
(5th Cir. 1976), *rev'd*, 430 U.S. 325
(1977) . . . . . 34

DiMarzo v. Cahill,
575 F.2d 15 (1st Cir. 1978), *cert. den. sub nom.*, Hall v. DiMarzo, ___
U.S. ___, 47 U.S.L.W. 3295 (1978) . . . . . 2, 26, 27

Duran v. Elrod,
542 F.2d 998 (7th Cir. 1976) . . . . . 13

Estelle v. Williams,
425 U.S. 501 (1976) . . . . . 12

Feeley v. Sampson,
570 F.2d 364 (1st Cir. 1978) . . . . . 26, 27

Finney v. Arkansas Board of Corrections,
505 F.2d 194 (8th Cir. 1974) . . . . . 26

French v. Owens,
CA #75-677-C (S.D.Ind. Sept. 11, 1978) . . . . . 34

Gates v. Collier,
390 F.Supp. 482 (N.D.Miss. 1975) . . . . . 34

Goldberg v. Kelly,
397 U.S. 254 (1969) . . . . . 26

Griffin v. Illinois,
351 U.S. 12 (1956) . . . . . 26

Guajardo v. Estelle,
432 F.Supp. 1373 (S.D.Tex. 1977),
*rev'd in part*, 580 F.2d 748 (5th Cir. 1978) . . . . . 34

Hamilton v. Love,
328 F.Supp. 1182 (E.D. Ark. 1977) . . . . . 13, 23

Hamilton v. Schiro,
338 F.Supp. 1016 (E.D.La. 1970) . . . . . 18

Holland v. Donelson,
Civ. Action #71-1442-8C (E.D.La. 1973) . . . . . 18

Houchins v. KQED, Inc.,
___ U.S. ___, 98 S.Ct. 2588 (1978) . . . . . 12

Ingraham v. Wright,
430 U.S. 651 (1977) . . . . . 12

Inmates of D.C. Jail v. Jackson,
416 F.Supp. 119 (D.D.C. 1976), *aff'd*
*in substance*, No. 75-1668 (D.C.Cir.
June 5, 1978) . . . . . 2

Inmates of San Diego County Jail v. Duffy,
528 F.2d 954 (9th Cir. 1975) . . . . . 14, 26



Inmates of Suffolk County Jail v. Eisenstadt,
360 F. Supp. 676 (D.Mass. 1973), *aff'd*,
494 F.2d 1196 (1st Cir. 1974) . . . . . 13

In Re Winship,
397 U.S. 358 (1970) . . . . . 12

Jones v. Wittenberg,
323 F.Supp. 93 (N.D.Ohio 1971),
*aff'd sub nom.*, Jones v. Metzger,
456 F.2d 854 (6th Cir. 1972) . . . . . 9, 13

McGinnis v. Royster,
410 U.S. 263 (1973) . . . . . 12

Meachum v. Fano,
427 U.S. 215 (1976) . . . . . 12

Miller v. Carson,
401 F.Supp. 835 (M.D. Fla. 1975),
*aff'd* 563 F.2d 741 (5th Cir. 1977) . . . . . 13, 24, 26

Monroe v. Pape,
363 U.S. 167 (1961) . . . . . 9

Montanye v. Haymes,
427 U.S. 236 (1976) . . . . . 2

Morrissey v. Brewer,
408 U.S. 471 (1972) . . . . . 3

Palmigiano v. Garrahy,
443 F.Supp. 956 (D.R.I. 1977) . . . . . 2, 19, 20

Patterson v. Morrisette,
564 F.2d 1109 (4th Cir. 1977) . . . . . 13, 26

Pell v. Procunier,
417 U.S. 817 (1974) . . . . . 3

Procunier v. Martinez,
416 U.S. 396 (1974) . . . . . 2

Procunier v. Navarette,
___ U.S. ___, 98 S.Ct. 855 (1977) . . . . . 2

Pugh v. Locke,
406 F.Supp. 318 (M.D.Ala. 1976), *aff'd in substance, sub nom.*, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied in relevant part, sub nom.*, Alabama v. Pugh,
___ U.S. ___, 98 S.Ct. 3057 (1978) . . . . . 2, 3, 34

Pugh v. Rainwater,
557 F.2d 1189 (5th Cir. 1977) . . . . . 7, 13, 24

Rhem v. Malcolm,
371 F.Supp. 594 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 333 (2nd Cir. 1974) . . . . . 4, 7, 12, 13, 23, 24, 26, 27

Smith v. Sampson,
349 F.Supp. 268 (D.N.H. 1972) . . . . . 27

Smith v. Shimp,
562 F.2d 423 (7th Cir. 1977) . . . . . 26

Stack v. Boyle,
342 U.S. 1 (1951) . . . . . 12

Taylor v. Perini,
413 F.Supp. 189 (N.D.Ohio 1976);
421 F.Supp. 740 (N.D.Ohio 1976);
431 F.Supp. 566 (N.D.Ohio 1977);
446 F.Supp. 1184 (N.D.Ohio 1977);
455 F.Supp. 1241 (N.D.Ohio 1978) . . . . . 20, 21

Taylor v. Sterrett,
532 F.2d 462 (5th Cir. 1976) . . . . . 24



Trigg v. Blanton,
No. A-6047, Memorandum Opinion (Chancery Court, Davidson County, Tennessee, August 23, 1978) . . . . . 2

United States ex rel Tyrrell v. Speaker,
535 F.2d 823 (3rd Cir. 1976) . . . . . 13, 26

Vest v. Lubbock County Commissioners Court, 444 F.Supp. 824 (N.D.Tex. 1977) . . . . . 16

Watson v. City of Memphis,
373 U.S. 526 (1963) . . . . . 26

Wolff v. McDonnell,
418 U.S. 539 (1974) . . . . . 2

Wolfish v. Levi,
428 F.Supp. 333 (S.D.N.Y. 1977), 439 F.Supp. 114 (S.D.N.Y. 1977), *aff'd in part and remanded in part*, 573 F.2d 118 (2nd Cir. 1978), *cert. granted sub nom.* Bell v. Wolfish, ___ U.S. ___, 99 S.Ct. 76 (1978) . . . . . 23, 24

**Standards:**

American Bar Association,
*Tentative Draft of Standards Relating to the Legal Status of Prisoners*, 14 Amer. Crim. L. Rev. 1 (1977) . . . . . 15, 32

American Correctional Association,
*Manual of Correctional Standards* (1966) . . . . . 14

American Correctional Association,
*Manual of Standards for Adult Local Detention Facilities* (1977) . . . . . 9, 14, 22, 31

American Public Health Association, *Standards for Health Services in Correctional Institutions* (1976) . . . . . 32

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) . . . . . 7, 9, 14

National Sheriffs' Association, *Handbooks on Inmate Rights; Jail Architecture; Jail Security, Classification and Discipline* (1974) . . . . . 9, 15, 31

New York City Board of Correction, *Minimum Standards for New York City Correctional Facilities* (1978) . . . . . 32

New York State Division of Criminal Justice Services *Correction Standards and Goals* (1977) . . . 32, 33

United States Department of Justice, *Draft Federal Standards for Corrections* (June 1978) . . . . . 22, 29, 30

**Other Authorities:**

Adams v. Mathis, No. CA-74-70-S (Trial Memorandum, M.D.Ala. February 14, 1977) . . . . . 16, 33

Alexander, M., *Jail Administration*, (Charles Thomas, Springfield, Illinois, 1957) . . . . . 7

American Law Institute, *Model Penal Law*, (1962) . . . . . 15

Blackstone, *Book IV*, 337 (1765) . . . . . 10

Breed, A., First Annual Report of Court Appointed Special Master in Palmigiano v. Garrahy (1978) . . . . . 20



Burger, Warren E., Address of the Chief Justice, *Proceedings of the National Conference on Corrections*, Williamsburg, Virginia, December 5-8, 1971 . . . . . 7

Carlson, N., *The Law and Corrections*, 6 U. San Fran. L. Rev. 77 (1971) . . . . . 7

Carlson, N., *Corrections in the United States Today*, 13 Amer. Crim. L. Rev. 635 (1976) . . . . . 17

Comment, *Incarcerating the Innocent*, 21 Buff. L. Rev. 891 (1972) . . . . . 7

Davis v. Montgomery County Jail, Civ. No. 76-205-N, (Trial Memorandum, November 16, 1977) . . . 15, 16, 33

DeBeaumont, G., and DeTocqueville, A., *On the Penitentiary System in the United States and Its Application in France*, (Carey, Lea & Blanchard, Philadelphia, 1833), Reprinted by A. Kelley (New York 1970) . . . . . 11

Freed and Wald, *Bail in the United States: A Report to the National Conference on Bail and Criminal Justice*, (1964) . . . . . 7

Goldfarb, R., *Jails*, (Anchor Press, 1976) . . . . . 9

Harris and Spiller, *After Decision: Implementation of Judicial Decrees in Correctional Settings*, (United States Government Printing Office, Oct. 1977) . . . . . 18, 19

Letter of Minnesota Corrections Commissioner Kenneth Schoen, *Civil Liberties Review*, (January-Febraury 1978) . . . . . 17

McGee, R., *Our Sick Jails*, 35 Fed. Prob. 3 (March 1971) . . . . . 7

Mattick, H., "The Contemporary Jails in the United States," *Handbook on Criminology*, ed. Glaser (Rand McNally: Chicago 1974) . . . . . 7

Menninger, *Our Dreadful Jails*, 6 San Fran. L. Rev. 1 (1971) . . . . . 8

President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, (1967) . . . . . 7

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, (1967) . . . . . 7

Rothman, *Of Prisons, Asylums and Other Decaying Institutions*, 26 Public Interest 1 (1972) . . . . . 9

Rothman, D., *The Discovery of the Asylum*, (Little, Brown & Co., 1971) . . . . . 9

Ruiz and United States v. Estelle, No. 72-H-1393 (S.D.Tex.) . . . . . 34

Tyler v. Percich, No. 74-40 C(2), (E.D.Mo. Oct. 2, 1974), *aff'd per curiam*, 74-1835 (8th Cir. 1974) . . . . . 16

United States v. Elrod, No. 76-C-4768 (N.D.Ill. 1976) . . . . . 16

United Nations, *Minimum Rules for the Treatment of Prisoners and Related Recommendations*, (U.N. Department of Economic and Social Affairs, 1958) . . . . . 15

United States Bureau of Prisons, Department of Justice, *New Rules for Jails: Guidelines for Planning*, edited by Richmond and Aderhold (June 1969) . . . . . 15



United States Department of Justice, Law Enforcement Assistance Administration, *Guidelines for Planning of Regional and Community Corrections Centers for Adults* (1971) . . . . . 15

United States Department of Justice, Law Enforcement Assistance Administration, *The Nations' Jails*, (1975) . . . . . 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1829

GRIFFIN B. BELL, *et al.*,
*Petitioners,*

v.

LOUIS WOLFISH, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AS AMICUS CURIAE

### INTEREST OF AMICUS CURIAE

The National Prison Project of the American Civil Liberties Union Foundation, Inc. is a non-profit, tax exempt corporation engaged in efforts through litigation, legislation and education to improve conditions of confinement in prisons, jails and juvenile institutions throughout the country and to develop and support rational, less costly, humane and effec-

tive alternatives to traditional incarceration. The Project has historically focused primarily upon litigation through its own staff counsel and support staff as well as volunteer cooperating attorneys and lay personnel throughout the various states. It also functions as a resource center for lawyers, legislators, corrections officials and courts.

Included in the broad range of litigation in which the Project has participated directly or as *amicus curiae* are the following cases: *DiMarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978), *cert. den. sub. nom., Hall v. DiMarzo*, ___U.S. ___, 47 U.S. L.W. 3295 (1978) (jail conditions declared unconstitutional); *Inmates of D.C. Jail v. Jackson*, 416 F.Supp. 119 (D.D.C. 1976), *aff'd in substance*, No. 75-1668, (D.C. Cir. June 5, 1978) (jail conditions declared unconstitutional); *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd in substance, sub. nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. den. in relevant part, sub. nom. Alabama v. Pugh*, ___ U.S. ___, 98 S.Ct. 3057 (1978) (prison system conditions declared unconstitutional); *Battle v. Anderson*, 376 F.Supp. 402 (E.D.Okla. 1974), *aff'd* 564 F.2d 388 (10th Cir. 1977) (prison conditions declared unconstitutional); *Trigg v. Blanton*, No. A-6047, Memorandum Opinion (Chancery Court, Davidson County, Tennessee, August 23, 1978) (prison system conditions declared unconstitutional); *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977) (prison system conditions declared unconstitutional); *Bono v. Saxbe*, 450 F.Supp. 934 (E.D. Ill. 1978) (certain conditions of confinement at federal prison declared unconstitutional); *Clonce v. Richardson*, 379 F.Supp. 338 (W.D. Mo. 1974) (involuntary transfer of federal prisoners into behavior modification program declared unconstitutional); *Procunier v. Navarette*, ___U.S. ___, 98 S.Ct. 855 (1977); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S.



396 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972).[1]

*Amicus Curiae* believes that if the Court were to adopt the position of the United States in this case it would seriously jeopardize the rights of prisoners confined in city and county jails as well as the ability of the *amicus* to protect those rights.

Consents to the filing of this brief have been given by all parties and have been heretofore filed with the Court.

## SUMMARY OF ARGUMENT

It has long been established that basic principles of fundamental fairness and the Constitution presume a person innocent until proven guilty and that pre-trial detainees may not be punished in any way or be subjected to any unnecessary deprivations which are unrelated to insuring their appearance at trial. Thus, any standards by which deprivations are measured for convicted offenders are not applicable to this case.

In spite of its protestations to the contrary, the United States is proposing a radical departure from established legal principles that have been applied for the last decade by various courts which have addressed these issues. The government argues that only deprivations which exceed the minimum threshold of the Eighth Amendment should

---

[1] It is of ironic significance that in *Battle, supra* and *Newman, supra*, the United States joined the National Prison Project in urging that the Constitution required the states of Oklahoma and Alabama to provide more living space for its prisoners than was provided by the Bureau of Prisons for federal prisoners prior to the order of the district court in the case at bar.

be prohibited in this case. The government is contending therefore that pre-trial detainees may be punished, as long as the punishment is not cruel and unusual.

The government's position has been firmly rejected by the various Courts of Appeals, and rightly so, given the history of abuse and atrocity in our nation's jails. Appropriate intervention by the courts, when other governmental officials have neglected their responsibility, has been responsible for significant reform. Although the Department of Justice, in litigating against state and local jails, has argued for it, they now, with respect to their own federal jail, attempt to reject ". . . the following propositions as 'now firmly embedded in the law.' The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent that necessary to assure appearance at trial and security of the jail." *Rhem v. Malcolm*, 507 F.2d 333, 336 (2nd Cir. 1976).

The positions argued by the United States on each specific issue in this case are contrary to every set of professionally recognized standards, including the tentative standards promulgated by the Department of Justice. It is irrational, and highly inappropriate, for the United States to argue one set of legal principles and for the application of minimum professional standards to state facilities, but to ask this Court to permit a different set of principles and standards for its own facilities. This is not federalism but despotism.

Because the decision of the Court of Appeals is a very narrow one, dealing with only a few specific issues, and is consistent with the decisions of the other courts of appeals, as well as all recognized professional standards, there are no special and important reasons for review by this Court.



The decision of the Court of Appeals should be affirmed, or the writ of certiorari should be dismissed as having been improvidently granted.

## ARGUMENT

### I. THE UNITED STATES' POSITION IN THIS CASE IGNORES THE HISTORICAL AND LEGAL DEVELOPMENTS WITH RESPECT TO THE STANDARD OF REVIEW OF THE CONDITIONS OF CONFINEMENT OF PRE-TRIAL DETAINEES OVER THE LAST DECADE.

In spite of its protestations to the contrary and its convoluted "three-tier" approach to the question of the appropriate standard in pre-trial detention case, the United States in its brief proposes a radical departure from well-established legal principles that have been applied virtually without exception over the last decade.[2] Courts have long held that basic principles of fundamental fairness and the Constitution presume a person innocent until proven guilty and that pre-

---

[2] The government's "three-tier" approach is apparently as follows: 1) fundamental rights which require a compelling necessity test; 2) rights deeply rooted in the nation's history and traditions which require a closer, but not strict, scrutiny to determine whether there is a reasonable relationship to any governmental interest including jail order, security, fiscal economy and administrative feasibility; 3) non-fundamental rights which do not fall within the first two tiers, and which require only a reasonable relationship to any governmental interest, including those listed in the second tier above.

As we point out in the text of our brief, the government's convoluted approach is a radical departure from the case law developed over the past decade; ignores the fact that pre-trial detainees, although presumed innocent, have lost their most fundamental right of freedom; and would create an irrational measuring of interests which would dictate how "closely" the courts should look at particular situations.

trial detainees may not be punished in any way or be subjected to any unnecessary deprivation which is not related to insuring his or her appearance at trial.

The government's position in this case is clearly at odds with these well established principles. Although it argues at one point that "due process requires that punishment not be inflicted or correction undertaken prior to adjudication of guilt" (Pet. Brief at 23), it later adopts the position that pre-trial detainees may be subjected to severe and substantial deprivations as long as they do not fall below "a minimum threshold of decency and humane treatment and [are] reasonable in light of the government's substantial administrative and fiscal concerns" (Pet. Brief at 49).

The government goes on to argue that the "minimum threshold" is the Eighth Amendment level of cruel and unusual punishment which applies to convicted offenders (Pet. Brief at 24 and 54 n.42). Thus the government is contending that detainees may be "punished" as long as the punishment is not "cruel or unusual."

### A. The Background To Litigation Involving the Conditions Of Confinement Of Pre-Trial Detention.

Conditions in American jails and the treatment afforded to those confined in them – both pre-trial and convicted persons[3] – is and has been a national disgrace. Professional

[3] Over 150,000 persons are confined in our jails. Approximately 50,000 of these are awaiting trial. United States Department of Justice, Law Enforcement Assistance Administration, *The Nations' Jails* (1975). It is further estimated that between 1.5 million and 5 million persons per year pass through or jails. National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, (1973) at 275 (hereafter NAC Standards).



commentators,[4] national commissions,[5] former[6] and present[7] Directors of the Federal Bureau of Prisons, and judges[8] are unanimous in their outrage and condemnation.[9] A preeminent psychiatrist with nationally recognized expertise has stated:

> Some people – and I am proud to be numbered among them – are so deeply and continuously disturbed by the knowledge of the great American

[4] Hans E. Mattick, "The Contemporary Jails in the United States," *Handbook on Criminology*, ed. Glaser (Rand McNally: Chicago 1974); Ronald Goldfarb, *Jails*, (Anchor Press, 1976); Richard McGee, *Our Sick Jails*, 35 Fed. Prob. 3 (March 1971); Comment, *Incarcerating the Innocent*, 21 Buff. L.R. 891 (1972).

[5] President's Commission on Law Enforcement and Administration of Justice, *Task Force: Corrections*, 24 (1967); *The Challenge of Crime in a Free Society*, A Report of the President's Commission on Law Enforcement and Administration of Justice 1978 (1967).

[6] Myrl E. Alexander, *Jail Administration* (Charles Thomas, Springfield, Ill., 1957) at 310.

[7] Norman Carlson, *The Law and Corrections*, 6 U. San Fran. L.R. 77, 83 (1971).

[8] For example, "Address of Chief Justice Warren E. Burger," *Proceedings of the National Conference on Corrections*, Williamsburg, Va., December 5-8, 1971, 10, 12; *Rhem v. Malcolm*, 371 F. Supp. 594, 636-7 (Lasker, J., S.D.N.Y. 1974) and *Pugh v. Rainwater*, 557 F.2d 1189, 1191-2 (5th Cir. 1977).

[9] Also see, Freed and Wald, *Bail in the United States: A Report to the National Conference on Bail and Criminal Justice*, 43-5, 1964.

jail atrocities that we cannot keep still about it. We write letters, we make speeches, we harangue our friends . . .

This great horrible cruelty is being practiced in semi-secret in over 4,000 places! One-hundred and fifty thousand human beings, mostly young ones, are locked up in cages and dungeons in the name of 'justice' and mercy by agents of the very people who are being wronged. This expensive, futile, absurd, cruel business does not rehabilitate anyone; it does not reform anyone; it does not change anyone for the better. It only enrages and stupefies and crushes already unstable, misdirected and confused people . . .

Unless we stop it, the shame of our jail system will hang about our necks like an albatross along with the shame of our slaughter of the American Indians and our unspeakable century of slave traffic.

Karl Menninger, *Our Dreadful Jails*, 6 San Francisco, L.R. 1, 6 (1971).

One court after another, in jurisdictions all over the country, have found similar conditions:

> . . . confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette . . .



> The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel. The expert testimony, uncontradicted and not successfully challenges, supplies this evidence. Most jails are bad, but this one is unusually bad.
>
> *Jones v. Wittenberg*, 323 F.Supp. 93, 99 (N.D.Ohio 1971)

These conditions have been with us for centuries, remaining unknown to the general public and impervious to several waves of non-judicial reform efforts both private and governmental.[10]

It was not until the last decade that judicial intervention occurred. Spurred on by this Court's resuscitation of the Civil Rights Act of 1871 in *Monroe v. Pape*, 363 U.S. 167 (1961), it's extension to prisoners in *Cooper v. Pate*, 378 U.S. 546 (1964), and the added impetus of governmental reports and professional recommendations, judges began looking into jail conditions. Many lawsuits were filed and the reported cases on the subject are now legion.[11] The United States Department of Justice over the past decade has been an important participant in this process. Through the Law Enforcement Assistance Administration, it has funded research, reports and standards projects[12] across the country.

---

10 In general, see Goldfarb, *Jails, supra* at 9-13; Rothman, *The Discovery of the Asylum* (Little Brown & Co., 1971); and Rothman, *Of Prisons, Asylums and Other Decaying Institutions*, 26 Public Interest (1972) at 1-17.

11 See cases cited *infra* at pp. 13, 14 and 22-27.

12 For example, LEAA has supported NAC corrections standards, the American Correctional Association *Manual of Standards for Adult Local Detention Facilities* (hereafter ACA Standards), and the National Sheriffs Association standards.

Through the Department's Civil Rights Division and local United States Attorneys' offices, they have filed lawsuits intervened in ongoing cases and participated as *amicus curiae* in jail and prison litigation.

**B. From Legal Developments During The Last Decade Has Emerged The Recognition Of A Standard To Determine The Constitutional Adequacy Of Conditions Of Confinement For Pre-Trial Detainees.**

The standard utilized by the courts below in this case as well as in other pre-trial condition cases is over two centuries old and as such is deeply rooted in Anglo-American jurisprudence.

> Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment; therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters nor subjected to other hardships than such as are absolutely requisite for the purposes of confinement only.
>
> Book IV Blackstone §337, p. 2523 (1765).

This fundamental notion of fairness and the logic that pretrial prisoners must be afforded better treatment than those



convicted of crimes was raised by foreign observers of the American scene in the 1830's:

> These arrested persons are precisely those for whom well regulated prisons ought to have been built. It is easy in fact to conceive, that he who has not yet been pronounced guilty, and he who has committed but a crime or misdemeanor comparatively slight, ought to be surrounded by much greater protection than such as are more advanced in crime, and whose guilt has been acknowledged.
>
> Arrested persons are sometimes innocent and always supposed to be so. How is it that we should suffer them to find in the prison a corruption which they did not bring with them?
>
> If they are guilty, why place them first in a house of arrest, fitted to corrupt them still more, except to reform them afterwards in a penitentiary, to which they will be sent after their conviction?
>
> G. DeBeaumont and A. DeTocqueville, *On The Penitentiary System in the United States and Its Application in France*, (Philadelphia: Carey, Lea & Blanchard, 1833) (trans. by Francis Leiber) Reprinted 1970 by Augustus M. Kelley, New York, p. 14.

This Court, as long ago as 1885, recognized the fundamental nature of the presumption of innocence in our criminal justice system:

> The principle that there is a presumption of innocence in favor of the accused is the undisputed law, axiomatic and elementary, and its enforcement

lies at the foundation of the administration of our criminal law.

*Coffin v. United States*, 156 U.S. 432, 453 (1895)

This principle has been repeatedly reaffirmed by the Court over the years. See for example, *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *In re Winship*, 397 U.S. 358, 364 (1970); and *Estelle v. Williams*, 425 U.S. 501, 504 (1976).

Moreover, this Court has repeatedly recognized the peculiar legal status of pre-trial detainees vis-a-vis those found guilty of crimes. In *McGinnis v. Royster*, 410 U.S. 263 (1973), the Court, in affirming the denial of good time credits for "jail time" stated:

> . . . Further, it would hardly be appropriate for the State to undertake in the pre-trial detention period programs to rehabilitate *a man still clothed with the presumption of innocence.*
>
> 410 U.S. at 273 (emphasis added)

See also, *Meachum v. Fano*, 427 U.S. 215, 225 (1976); *Ingraham v. Wright*, 430 U.S. 651, 669 (1977); *Bounds v. Smith*, 430 U.S. 817, 840 (1977) (Rehnquist, J. dissenting); and *Houchins v. KOED, Inc.*, ___ U.S. ___ 98 S.Ct. 2588, 2608-9 and n.34 (1978) (Stevens, J. dissenting).

In the last decade, the Courts of Appeals as well as a host of district courts virtually without exception have accepted the viability of the principle of the presumption of innocence and have applied this principle to cover the conditions of pre-trial custody. Illustrative of these holdings is the Second Circuit decision in *Rhem v. Malcolm*, 507 F.2d 333, 336 (1976):



> As (the district judge) viewed it, the core of plaintiffs' constitutional arguments is that they are not convicted felons but are pre-trial detainees, presumed innocent of the charges against them but imprisoned only for failure to make bail. The judge accepted the following propositions as 'now firmly embedded in the law.' The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail; and the same constitutional provisions prevent unjustifiable confinement of detainees under worse conditions than convicted prisoners. 371 F.Supp. at 623. We agree with these propositions and rely, as did the district judge, upon the considerable number of recent decisions applying them.

In accord, First Circuit: *Inmates of Suffolk Co. Jail v. Eisenstadt*, 360 F.Supp. 676, 685-8 (D.Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974); Second Circuit: *Rhem v. Malcolm*, supra at 622-4 (S.D.N.Y. 1974), *aff'd*, supra at 336-8 (2nd Cir. 1974); Third Circuit: *United States ex rel Tyrrell v. Speaker*, 535 F.2d 823, 827 (3rd Cir. 1976); Fourth Circuit: *Patterson v. Morrisette*, 564 F.2d 1109, 1110 (4th Cir. 1977); Fifth Circuit: *Pugh v. Rainwater*, supra at 1191-2 (5th Cir. 1977) (dicta); *Miller v. Carson*, 401 F.Supp. 835, 865-7 (M.D.Fla. 1975), *aff'd*, 563 F.2d 741, 746-50 (5th Cir. 1977); Sixth Circuit: *Jones v. Wittenberg*, 323 F.Supp. 93, 99-100 (N.D.Ohio 1970), *aff'd sub nom Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); Seventh Circuit: *Duran v. Elrod*, 542 F.2d 998, 999-100 (7th Cir. 1976); Eighth Circuit: *Hamilton v. Love*, 328 F.Supp. 1182, 1191-2 (E.D.Ark. 1977); *Ahrens v. Thomas*, 434 F.Supp.

873, 897-8 (W.D.Mo. 1977), *aff'd*, 570 F.2d 286 (8th Cir. 1978); Ninth Circuit: *Brenneman v. Madigan*, 434 F.Supp. 128, 135-7, 142 (N.D.Cal. 1972); *Inmates of San Diego County Jail v. Duffy*, 528 F.2d 954, 956 (9th Cir. 1975); District of Columbia Circuit: *Campbell v. McGruder*, 416 F.Supp. 100, 104-5 (D.D.C. 1975), *aff'd* 580 F.2d 521, 527-33 (D.C.Cir. 1978).

Further support for this principle and its application to the conditions of pre-trial confinement comes from professionally recognized standards. The ACA Standards in its "Discussion" of Standard 5252, states, "Persons awaiting trial are not in the same class as those serving sentences. Because they are presumed innocent, only the least restrictive means necessary should be used to maintain them in custody." (p. 54)[13] The American Correctional Association, *Manual of Correctional Standards* (1966) Declaration of Principles, Principle V, recognizes that:

> Until the guilt of the suspected offender has been established in the course of due process of law, he should be considered innocent and his rights as a free citizen should be respected, except for such restraints as are indispensable to insure the proper investigation and trial.
>
> at p. xx

In accord: National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) (hereafter NAC Standards) Standard 4.8 and Commentary at 133-4; National Sheriffs' Association, *Inmate Rights* (1974) at 19; The American Bar Association, *Tentative Draft of Standards Relating to the Legal Statuts of Prisoners*, 14 American Crim. L. R. 1 (1977) (hereafter ABA Tent. Standards), Standard 7.1 and Commentary at 565-9; United Nations *Minimum Rules for the Treatment of Prisoners and Related Recommendations* (U.N. Department of Economic and Social Affairs, 1958) Rule 84 at 7; American Law Institute, *Model Penal Law* (1962) at § 303.1; and Law Enforcement Assistance Administration, Department of Justice, *Guidelines for Planning and Design of Regional and Community Corrections Centers for Adults* (1971) (hereafter LEAA Standards) at E.4.1. The Federal Bureau of Prisons itself accepts this elementary principle in materials it provides to assist local pre-trial facilities: "Every accused person, rich or poor, is presumed to be innocent until proven guilty. Legally, the only assurance that properly can be demanded of an accused person is that he will be present for trial."[14]

[13] The ACA Standards indicate that Norman Carlson, one of the petitioners herein was President-elect of the ACA (p. xvi) and that he was a member of the Commission on Standards and Accreditation, which approved and administers the Standards (p. xvi-xvii).



For many years, the Department of Justice has strongly supported this view when dealing with state and local institutions. The Department has an extensive docket of cases which challenge the conditions and treatment of pre-trial detainees across the nation. Illustrative of the Department's position is the following from its trial memorandum dated November 16, 1977, in the case entitled *Davis v. Montgomery County Jail* (Civ. #76-205-N) and filed in the United States District Court for the Middle District of Alabama:

> In gauging the (Fourteenth) Amendment's applicability it is first necessary to note the age-old right to freedom before conviction; the presumption of innocence is fundamental in society . . . (p. 7)

[14] U.S. Bureau of Prisons, Department of Justice, *New Roles for Jails: Guidelines for Planning*, ed. Richmond and Aderhold (June 1969).

> With respect to persons awaiting trial this principle (the presumption of innocence) means that any burden on them may be no more restrictive than necessary to assume their appearance at trial. The method chosen must be the least restrictive of all alternatives. (p. 8).

See also, *Adams v. Mathis*, No. CA 74-70-S (M.D.Ala.) (In this case against the Houston County, Alabama, Jail the United States Attorney appeared as *amicus curiae* and the Civil Rights Division for the United States as plaintiff-intervenor); *Tyler v. Percich*, No. 74-40 C(2) (E.D.Mo.) (In this St. Louis, Mo. jail case, United States first appeared as litigating *amicus curiae* and later as plaintiff-intervenor); *United States v. Elrod*, No. 76-C 4768 (N.D.Ill.) (In this Cook County Jail case the United States filed the lawsuit); and *Vest v. Lubbock County*, No. 5-76-53 (N.D.Tex) (In this Lubbock County, Texas Jail case, the United States appeared as plaintiff-intervenor). In each of these cases, the United States argued for the position quoted from *Davis v. Montgomery County Jail, supra* with respect to the treatment of pre-trial detainees in *state* detention facilities.

### C. The Results Of These Legal Developments Have Been Encouraging And This Court Should Not Impede Those Efforts Prematurely.

The Department's position would inevitably, if adopted by this Court, turn back the clock on all of the efforts, including those of the Department of Justice itself, made in the last decade to improve the conditions for pre-trial detainees in our jails. It is clear that appropriate judicial intervention has been a major catalyst for improving the conditions of confinement for many pre-trial detainees. To adopt the position argued by the United States in this



case would undermine this important progress. It is instructive, therefore, to look at what has been accomplished and what remains to be done. As Petitioner Norman Carlson, Director of the Federal Bureau of Prisons, said recently:

> The judiciary has compelled penal administrators, executive officials, and legislators at all levels of our society to face squarely the problems associated with treatment of offenders and has spurred constructive action to resolve these problems. As we move into the third century of the nation's history it is virtually certain that the courts will take further steps to awaken all Americans to the need for less crowded, more humane penal institutions, which are secure enough to protect society without creating conditions that threaten the basic rights of inmates and which permit both inmates and prison staff to work and live with a larger degree of safety and dignity.[15]

An overall assessment of the impact of judicial intervention is yet to be made. Nevertheless, we do have the results of several independent evaluations and other indicators that illustrate that while there is a long way to go, significant improvements have been made.

In one widely known study commissioned by the Law Enforcement Assistance Administration of the Department of Justice, the researchers looked at the impact of federal

---

15 Norman Carlson, *Corrections in the United States Today*, 13 Am. Cr. L.R. 635 (1976). Also see, testimony of former New York City Commissioner of Correction McGrath in *Rhem v. Malcolm*, 371 F.Supp. at 636 and Minnesota Corrections Commissioner Kenneth Schoen letter in *The Civil Liberties Review* (Jan.Feb. 1978) at 6 and 80.

court decrees in three separate jail cases.[16] Those decrees were all based upon judicial findings of unconstitutional conditions and treatment of prisoners.[17] As a direct result of the court's orders, the following occurred:

(1) *Holland v. Donelson* – overcrowding was controlled; "all prisoners received beds; tension decreased, safety was enhanced and maintenance (of physical facilities) improved." The population limits resulted in the implementation of programs which reduced "the number and length of detentions." The delivery of medical services was improved.[18]

(2) *Collins v. Schoonfield* – ended long and arbitrary punishment under "harsh conditions;" communication with the free world, food, medical care, and standards of punishment" were improved; the general level of sanitation was also improved.[19]

(3) *Hamilton v. Schiro* – the decision contributed to a "reduction in the number of incidents of violence, [m]edical services were improved under a contract with a public hospital and improvements and renovation of the physical structure was commended."[20]

---

16 Harris and Spiller, *After Decision: Implementation of Judicial Decrees in Correctional Settings*, (United States Government Printing Office, October 1977).

17 *Hamilton v. Schiro*, 338 F.Supp. 1016, 1017 (E.D. La. 1970); *Holland v. Donelson* (unreported decision) Civil Action #71-1442 8C (E.D.La. 1973) Sl.Op. 6; and *Collins v. Schoonfield*, *supra* at 258.

18 See n.16 at 22.

19 See n.16 at 23.

20 See n.16 at 23.



Although the study found that "life in the facilities was . . . still dismal" and "seriously overcrowded," judicial intervention had the salutory effects of "creating pressure for management reforms," including increased funding, changes in personnel policies, additional personnel and new facilities."[21] Most importantly, judicial intervention was perceived as focusing public attention on jail and prison conditions and as "rais[ing] correctional policy issues to the level of public concern."[22] As a result of this increased public education, "[l]egislative, regulatory and supervisory bodies adopted rules, provided funds, and took other actions that facilitated correctional improvements."[23] Administrators learned:

> that the substantive changes required were desirable and necessary. Once administrators discovered that the operational changes required by court decree were sound and feasible, there was a movement toward an anticipatory stance. Correctional administrators resolved to keep abreast of the thinking of courts and standard-setting bodies and to make appropriate changes without being ordered to make them.[24]

In *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977), the Court found that both pre-trial detainees and convicted offenders were being subjected to numerous conditions of confinement which fell below constitutional minima. Pre-trial detainees in *Palmigiano* were subjected to the same

---

21 See n.16 at 24.

22 See n.16 at 26.

23 See n.16 at 26.

24 See n.16 at 27.

deplorable physical conditions and rampant violence as were convicted offenders. As a result of the court's order, the pre-trial detainees in Rhode Island are now being housed separate from other offenders and are no longer subjected to the threat of violence which existed in 1977.[25] Similarly, at the time of the court order pre-trial detainees in Rhode Island were being subjected to medical care so deficient that the court labeled it "life threatening." Again, as the result of the court order, there have been "remarkable improvements" in the delivery of medical care for all prisoners in Rhode Island in the last year and the life threatening situation no longer exists.[26]

*Taylor v. Perini,* a case filed in 1969 in the United States District Court for the Northern District of Ohio, presents another example of the importance of judicial intervention. As a result of the proceedings in this case involving a challenge to the conditions of confinement of Ohio prisoners at that state's Marion Correctional Institution, a detailed consent order was entered. This order, required, among other things, changes in correspondence and publication policies (including termination of a publishers-only rule), disciplinary policies, a limitation on the length of disciplinary segregation, housing and work assignment policies in order to halt racial discrimination, and the creation of an effective inmate grievance procedure. 413 F.Supp. 189, 194-7 (N.D.Ohio 1976) (Order entered in 1972). A special master was appointed to investigate and report to the court on

---

25 443 F.Supp. at 973.

26 See the first annual report of the court appointed special master, Allen Breed, now Executive Director of the National Institute of Corrections, United States Department of Justice.



the state of compliance with its order. Thereafter the master issued a series of reports, all of which were confirmed by the court. 413 F.Supp. 189, 198 (First Report); 421 F.Supp. 740, 742 (N.D.Oh. 1976) (Second Report); 431 F.Supp. 566, 570 (N.D.Oh. 1977) (Third Report); and 446 F.Supp. 1184, 1186 (N.D.Oh. 1977) (Fourth Report). This report was also confirmed by the district court. Recently, the master filed his Fifth Report in which he stated that the prison authorities had "achieved substantial compliance"[27] with the 1972 order and as a result of this accomplishment "the time had arrived for the Court to terminate ongoing supervision of the defendants' activities." 455 F.Supp. 1241, 1255 (N.D.Oh. 1978). The district court confirmed this recommendation as well. The teaching of these cases overwhelmingly demonstrates not only the necessity and feasibility of this approach to prison and jail cases but the impact of cooperative efforts to bring about necessary change.

In conclusion, the government has failed to give any adequate reason to depart from the deeply rooted legal principle of the presumption of innocence and its application to the conditions of pre-trial detention. Moreover, and most importantly, the government has utterly failed to give any adequate reason to ignore the results and experience of the last decade of judicial scrutiny which has helped to encourage progress in bringing the nation's jails up to minimum constitutional standards.[28]

---

27 With respect to the implementation of a grievance procedure, the Ohio Department of Rehabilitation and Correction issued administrative regulations on December 26, 1976, requiring that all of Ohio's correctional facilities establish grievance procedures on the Marion model. 431 F.Supp. at 571.

28 For a similar analysis by Marshall, J. in the context of law libraries for prisoners, see *Bounds v. Smith,* 430 U.S. 817, ___, 97 S.Ct. 1491, 1499 (1977).

## II. THE OPINION AND JUDGMENT OF THE SECOND CIRCUIT COURT OF APPEALS PROVIDE NO SPECIAL AND IMPORTANT REASONS FOR REVIEW BY THIS COURT AS REQUIRED BY RULE 19 AND THE WRIT OF CERTIORARI SHOULD THEREFORE BE DISMISSED AS IMPROVIDENTLY GRANTED

As has been shown above, the opinion and judgment of the court below as to the appropriate constitutional standard to be applied to conditions of pre-trial detainees only reflects basic assumptions of Anglo-American jurisprudence which have been historically recognized by the courts of this country. Further, as will be shown below, the specific remedies required by the action of the courts below are required by virtually every set of recognized professional and correctional standards in existence – including the *Draft Standards* of the Petitioners and the standards adopted by the American Correctional Association. Moreover, the United States has for years, in litigation concerning state and county jails and prisons, urged successfully to courts throughout this country that deprivations such as those enjoined in this case violate the basic constitutional rights of detainees and prisoners. Thus, neither the standard utilized in the Second Circuit Court of Appeals nor the specific remedies sustained and challenged in the Petition establish "special and important reasons" for review by this Court.

### A. The Standard Of Review Recognized By The Court Of Appeals Is Deeply Rooted In American Jurisprudence And Is Recognized By Other Courts

The opinion of the court of appeals does not raise any unique or unresolved constitutional question. Everyone, including the government, at least rhetorically, recognizes that: (1) Pre-trial detainees are presumed to be innocent (Pet.



Brief 37, 38); (2) The only objective of pre-trial confinement is to insure the detainee's presence at trial (Pet. Brief 43); and (3) Pre-trial detainees cannot be "punished" at all (Pet. Brief 39, 40).

The case only takes on any particular significance as a result of the novel, radical and regressive theory posited by the United States that this Court should, in order to reverse the remedies ordered below, ignore the fundamental premise that pre-trial detainees are presumed to be innocent and adopt their new "three-tier" standard. As has been stated above, this standard, for all practical purposes, limits deprivations only when they rise to the level of cruel and unusual punishment under the Eighth Amendment.

There is presently no substantial dispute among the appellate courts as to the applicable constitutional standard to be applied in pre-trial detainee cases and certainly none of them have ever adopted the present position of the government in this case.

The preeminent case on this issue is, in fact, *Rhem v. Malcolm, supra,* the precursor in the Second Circuit to *Wolfish.* The court therein enunciated the long-standing doctrine that pre-trial detainees cannot be deprived of the rights of other citizens to a greater extent than is necessary to assure appearance at trial and security of the jail, or, in other words:

> the conditions of incarceration for detainees must cumulatively add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty.
>
> Citing *Hamilton v. Love,* 328 F.Supp. 1182, 1192 (E.D.Ark. 1971). *Rhem, supra* at 351.

Obviously, as was specifically stated by the court of appeals, not *all* deprivations rise to the level of constitutional significance. Further, deprivations which are related to the purpose of confinement and are "compelled by administrative necessity" are allowed. *Wolfish, supra* at 120.

The totally inaccurate representation by the government that the standard adopted by the court of appeals requires a compelling necessity for "every" deprivation and is "unlimited" in application is simply a misreading of the clear language of the decision. In fact, various "deprivations" were allowed to remain intact by the lower court. The removal of these deprivations would have clearly made life more comfortable and consonant with free-world living.

*Rhem v. Malcolm* has been generally cited and adopted by other courts of appeal as representing the appropriate standard to be used.

In *Taylor v. Sterrett,* 532 F.2d 462, 470, 472 (5th Cir. 1976), the Fifth Circuit Court of Appeals, citing *Rhem,* stated that pre-trial detainees must be held under the least restrictive means necessary to assure their presence at trial and that if a practice or procedure was justified by jail security then there had to be a showing that there was no reasonable alternative means available to meet the security need. See also, *Pugh v. Rainwater,* 557 F.2d 1189, 1191-2 (5th Cir. 1977). In a later case, the same court stated, "Pre-trial detainees are not to be subjected to any hardships except those absolutely requisite for the purpose of confinement only." *Miller v. Carson,* 563 F.2d 741, 747 (5th Cir. 1977).

In *Campbell v. McGruder,* 580 F.2d 521 (D.C. Cir. 1978), the court discredited the government's derogation of the pre-



sumption of innocence to an evidentiary rule (Pet. Brief 37, 38) by stating that to construe the presumption of innocence as "largely irrelevant" to the condition of pre-trial confinement is "to profoundly misconstrue it." The court then cited *Rhem* for the proposition that if deprivations are based upon reasons unrelated to confinement alone, then those deprivations are to be justified by a *compelling* necessity. *Id* at 529, 531. The United States cites *Campbell* to support its rather extraordinary position that unless "fundamental interests" under their three-tier formula are effected, due process is satisfied if the conditions or practices are "reasonable in light of the valid government objectives in maintaining jail order and security *and of substantial considerations of fiscal economy or administrative feasibility"* (Pet. Brief 45). To the extent that the *Campbell* court allowed reliance on costs at all, it limited that factor to "substantial necessities of jail administration" and "feasible costs" after a careful examination of "each" restriction of the "jail regime" *Id* at 531. Further, the court explicitly stated that even if "feasible costs" were relevant, that factor could not be "determinative" of constitutional rights. *Id.* at 540.

It is difficult to conceive of how a judge could rationally utilize the government's standard of "fiscal economy" when, as in this case, the Petitioner presumably could have access to billions of dollars in the treasury. More importantly, the government's position lends itself to allowing irresponsible officials to totally stifle courts by simply lowering budgets for jails or prisons.

On the other hand, the *Campbell* language concerns "feasible costs." If the cost is "not feasible" then the act required can't be done at all and presumably the jailer could justify the action or lack thereof under the traditional "compelling interest" standard. See *Campbell, supra* at 538.

Moreover, the attempted "fiscal economy" justification for constitutional deprivations has been universally rejected. See, e.g., *DiMarzo v. Cahill, supra; Rhem v. Malcolm, supra; Miller v. Carson, supra; Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974); *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977); *Watson v. City of Memphis,* 373 U.S. 526 (1963); *Goldberg v. Kelly,* 397 U.S. 254 (1969); and *Griffin v. Illinois,* 351 U.S. 12 (1956). See also, *Battle v. Anderson, supra,* Brief for Plaintiff-Intervenor United States (August 15, 1977) ("Constitutional requirements may not be limited by monetary considerations"). This case also does not present a real issue of whether or not fiscal matters can be considered in the fashioning of the remedy that will cure the constitutional deprivations found.

In *Inmates of San Diego County Jail v. Duffy,* 528 F.2d 954, 956 (9th Cir. 1975), the court reversed a district court decision which had not utilized the enhanced standard to be applied in the case of pre-trial detainees and ordered that court to reconsider its decision "in light of the rationale of . . . *Rhem v. Malcolm.*" Similarly, in *Patterson v. Morrisette,* 564 F.2d 1109, 1110 (4th Cir. 1977), the court noted that the standard it applied to pre-trial detainees was in accord with *Rhem,* as did the Third Circuit Court of Appeals in *United States ex rel Tyrrell v. Speaker,* 535 F.2d 823, 827 (3rd Cir. 1976). See also, *Smith v. Shimp,* 562 F.2d 423 (7th Cir. 1977).

Indeed, the only court of appeals case which has addressed the issue directly and which substantially deviated from the *Rhem* standard is *Feeley v. Sampson,* 570 F.2d 364 (1st Cir. 1978). *Feeley,* which the government must rely upon to support its position, is an historical accident and does not at this time represent the views of the First Circuit. The majority in *Feeley* only included one active



sitting judge from the First Circuit, Judge Campbell. The other judge in the majority was sitting by designation from the United States Court of Customs and Patent Appeals. Cheif Judge Coffin, dissenting in *Feeley,* cited to *Rhem* and other similar cases to indicate that ". . . the almost universal state of authority is in stark disagreement with the court's [majority's] analysis." 570 F.2d at 377, 379. Judge Bownes, who as the district court judge in *Feeley* had utilized the *Rhem* standard, now sits with Judges Coffin and Campbell as the three active judges of the First Circuit.[29]

After being elevated to the court of appeals, Judge Bownes, writing for the entire court in *DiMarzo v. Cahill, supra,* at 20, noted that "many courts have held that pre-trial detainees are to be confined only to the degree necessary to guarantee their presence at trial," citing *Rhem* and other similar cases. Although the First Circuit did not feel it necessary to expressly disapprove of the *Feeley* standard in *DiMarzo,* it clearly no longer has vitality for a majority of that court.

Consequently, there is no disagreement among the Circuit Courts of Appeals that should prompt this Court to seriously consider reversing the historically and generally accepted standard for pre-trial detainees.

---

29 For consistent pre-*Rhem* decisions on jails by Judge Bownes, see *Smith v. Sampson,* 349 F. Supp. 268 (D.N.H. 1972) and *Conklin v. Hancock,* 334 F. Supp. 1119 (D.N.H. 1971).

**B. The Specific Holdings Of The Court Below Challenged By The Government Are Consistent With All Recognized Professional Standards And This Is Not An Appropriate Case In Which To Challenge The Constitutional Standard To Be Applied To Conditions Of Confinement For Pre-Trial Detainees.**

This case in no way presents a challenge to the structure of the Metropolitan Correctional Center. The only issue before the Court relating to structural deficiencies was created by the Bureau of Prisons double-celling two people in a 75 sq. ft. space designed and suited to house only one person.[30] The other four specific practices which were enjoined and are presented to this Court are: the prohibition on the receipt by detainees of books, magazines and other written material from any source other than the publisher or book-clubs – the "publishers only" rule; the prohibition of the receipt of any and all packages by inmates (except for one food package at Christmas); the practice of conducting a strip search of detainees after every contact visit which required that the detainee remove all of his/her clothing, display his/her hands and armpits, open his/her mouth, lift his genitals, display the soles of his/her feet, bend over and spread his/her buttocks for a visual anal inspection, and, for

[30] The collateral and serious deprivations to prisoners which were caused by this action and which were ruled upon by the trial court in finding that the double-celling in this case was unconstitutional are amply provided in the Respondents' Statement of the Facts. Contrary to the suggestions in the government's brief (e.g. at p. 54), no party is arguing that this Court should go beyond the facts in this case and hold that double-celling under any and all conditions is unconstitutional.



female inmates, a visual vaginal inspection;[31] and, the random searches of cells without the presence of the detainee.[32] By enjoining all five practices, the trial court required no more than any current set of recognized minimum standards which address those issues does.

Of particular note in this regard are the *Draft Federal Standards for Corrections* published in June of this year by the United States Department of Justice after being drafted by the Bureau of Prisons and other Justice Department personnel, including Petitioner Carlson. In his introduction to the *Draft Standards* Petitioner Attorney General Bell, identified the goals of the standards to be: (1) to be responsive to constitutional issues; (2) to promote practices that are humane and responsive to the constitutional rights of the individual; and (3) to promote practices which will ensure that correctional facilities are safe, secure and manageable (at p. 1).[33] Petitioner Bell further stated "that the standards might be looked to in fashioning a remedy when a court independently finds constitutional or legal violations have occurred." and that

[31] The trial judge found this process to be "unpleasant, embarrassing and humiliating" as well as not rationally related to security interests at the M.C.C.

[32] The trial judge found that this practice raised tension and hostilities and that destruction of detainee property could be reduced by allowing the detainee to remain a reasonable distance away. The court of appeals added there was *no reason* to deprive the detainee of this privilege.

[33] Obviously, the drafters and Petitioners Bell and Carlson determined that the standards as drafted would not compromise security interests of jailers or be unmanageable. Further, it appears that the drafters were attempting to set a basic level of conditions which must be maintained to be "humane." The government in its brief at p. 24 concedes that detainess must be afforded "humane" living conditions.

> the Department of Justice must . . . be willing to embrace the goals and objectives set forth in the standards and apply those standards to its own correctional program (at 2 and 3).

The *Draft Standards*, which apply to jails, speak to four of the five specific issues before the Court and, after taking security needs into account, are inconsistent with the government's position on each of the four. The standards require: (1) all cells designed for single occupancy house only one person and that there is at least 60 sq. ft. per prisoner of living space (excluding activity space) as opposed to the 37½ sq. ft. provided by the double-celling at the Metropolitan Correctional Center (Physical Plant 002, 004-006); (2) prisoners and detainees can receive books and other publications from sources other than the publisher (Mail and Visiting 002); (3) no limit on receipt of mail or other publications, including packages, except where there is clear and convincing evidence to justify the limitation (Mail and Visiting 002); and (4) the use of nonintrusive sensors and other techniques instead of body searches whenever feasible; and prohibition of visual inspection of body cavities except where there is a "real suspicion" and, when conducted, a requirement that they be conducted in a manner whereby the "dignity and integrity" of the individual will be preserved (Security and Control 013). It is certainly anomalous that the same government which has determined that the above standards would support constitutional, humane and secure institutions would rely upon fiscal feasibility and a rational relation test to defend inconsistent practices in one of their own jails.

Other more established professional standards dictate the same conclusions. The American Correctional Association has existed since 1870 as the professional organization for



correction personnel. In December of 1977, that association produced its *Manual of Standards for Adult Local Detention Facilities.* The primary goals were to assure: 1) security; (2) humane and efficient management of inmates; and 3) provision of services necessary to maintain the physical, social and emotional health of inmates (p. xix). Moreover, the standards were successfully field-tested in jails in Illinois, California and Maryland. Those standards require that: (1) cells designed for single-occupancy house only one person and that cells have at least 60 sq. ft., except that the minimum increases to 80 sq. ft. if the person is held in the cell for more than 10 hours a day (5102, 5103, p. 21); (2) there is no limitation on the volume of mail an inmate may send or receive, unless there is clear and convincing evidence to justify such limitation (5307, p. 64); (3) searches should be conducted no more frequently than necessary and in a manner so as to avoid embarrassment or indignity to the inmate. Nonintrusive sensors and other techniques instead of body searches should be used whenever feasible and the presence of health care personnel is required at the time of body searches (5246, 5270, pp. 50, 56); and (4) Inmates should be in the vicinity of their cells when any search of said cells are being conducted (5213, p. 44).

The National Sheriff's Association in 1974 published a set of standards for the jails for which they are responsible. Those standards provide for: (1) single occupancy cells with 70 to 80 sq. ft. of living space within the cell (*Jail Architecture*, pp. 62, 63); (2) inmates having access to a wider range of reading material (*Inmate Legal Rights*, p. 44); and (3) inmates' presence during any search of his/her cell (*Jail Security, Classification and Discipline*, p. 45).

Other special purpose professional groups have addressed the particular issues raised in this case which are within their area of expertise. For example, the *ABA Tent. Standards* provide for the receipt of packages subject to them being opened and searched, §6.1(d), and the presence of the prisoner at his or her cell when a search is being conducted, except in an emergency, §6.6(d). The American Public Health Association's *Standards for Health Services in Correctional Institutions* (1976) for public health reasons require a minimum of 60 sq. ft. of living space in single-occupancy cells and 75 sq. ft. in multiple-occupancy living areas with at least half that amount of space additionally provided for activity area (pp. 62, 63).

Suffice it to say that although all standards developed by reputable professional organizations contain some standards in support of the remedies objected to by the government, *amicus curiae* has been unable to find any standards which support the government's positions.

Moreover, local and state authorities have adopted standards for facilities which recognize that the specific remedies required by the lower court in *Wolfish* are not only needed but workable. Of particular note are the New York City Board of Correction *Minimum Standards for New York City Correctional Facilities* which, of course, are to be applied to jails in the very geographical location as the Metropolitan Correctional Center. Those standards provide: (1) a cell or room designed for single occupancy shall house only one prisoner, and multiple-occupancy areas shall provide a minimum of 75 sq. ft. per person in the sleeping area (§5.2, p. 5); (2) publications can be received from any source (§14.1, p. 2); and (3) prisoners are allowed to receive packages from any person (§13.1, p. 14). Similarly, the *Corrections Standards and Goals* produced by the New



York State Division of Criminal Justice Services provide for: (1) no double-celling in single-occupancy cells (§5.1(c), p. 17); (2) prisoners are allowed to receive publications from any source (§5.11, p. 31); (3) packages can be received by prisoners subject to search (§5.11, p. 13); (4) inspection of anal or vaginal cavities can be done only with probable cause (§5.14, p. 35); and (5) prisoners are to be present to observe searches of cells when they are made (§5.14(e), p. 34).

In light of the above, the government's argument that the remedies in issue are required by fiscal or security needs seem hollow. Moreover, in its own actions in cases where it is not defending Federal Bureau of Prisons' practices but litigating over state and local facility practices and conditions, the United States has never taken any position consistent with those taken in *Wolfish*, but has rather always taken positions consistent with those of the lower courts when the issues have been raised.

For example, in the Final Memorandum of the United States of November 16, 1977 in the case of *Davis v. Montgomery County Jail*, (M.D.Ala.) C.A. #76-205-N, the government maintained as an *amicus curiae* that only one person could be housed in a single-occupancy cell and that each cell had to contain at least 60 sq. ft. of living space (p. 11). A similar position was taken as Plaintiff-Intervenor in both their Trial Memorandum and Brief in the Fifth Circuit Court of Appeals in *Adams v. Mathis*, (M.D.Ala.) C.A. #74-70.S, *supra*. In *Battle v. Anderson*, *supra*, as Plaintiff-Intervenor, the United States in its Brief to the Tenth Circuit Court of Appeals (No. 77-1554) specifically urged that 39 sq. ft. per prisoner (1½ sq. ft. more than allowed at the Metropolitan Correctional Center) was unconstitutional and that the appropriate constitutional standard would be a minimum of

60 sq. ft. in single cells and 75 sq. ft. in multiple-occupancy room s(pp. 12, 16). The same position was taken as *amicus curiae* in the case of *French v. Owens*, (S.D.Ind.) C.A. #75-677-C, in the United States' Proposed Findings of Fact, Conclusions of Law and Order signed on September 11, 1978. See also, *Pugh v. Locke, supra; Costello v. Wainwright*, 397 F.Supp. 20 (M.D.Fla. 1975), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd*, 430 U.S. 325 (1977) and *Ruiz and United States v. Estelle*, No. 72-H-1393 (S.D.Tex).

In spite of the "security" interest asserted in *Wolfish* concerning the "publishers only" rule and the ban on the receipt of packages, the United States' Comment on the Proposed Compromise and Dismissal filed in the district court in *Guajardo v. Estelle*, 432 F.Supp. 1373 (S.D.Tex. 1977), *rev'd in part*, 580 F.2d 748 (5th Cir. 1978) stated, "It is difficult to perceive how the 'publishers only rule' is necessary or essential to any legitimate penal interest" (p. 8) and that "the exclusion of all packages is unduly restrictive. . . If the goal is the exclusion of contraband, there are less restrictive means of achieving this end" (p. 4). See also, *Battle v. Anderson, supra* and *Gates and United States v. Collier*, 390 F.Supp. 482, 494 (N.D. Miss. 1975).

One cannot assume that the United States for years, and up until the recent date, has been forcing state and local governments through constitutional litigation to adopt practices that are fiscally or administratively not feasible, or are a threat to the serious security interests of the jailor or are not required, in the government's mind, by the Constitution. That this same government is now reaching for new and regressive positions to defend practices at its own jail seems clear.

As then Judge, now Petitioner Attorney General Bell, has stated:



> I concur specially to indicate my agreement with the result reached by the majority, and also to record my continuing belief that all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct . . . It is regrettable that we have one law for Athens and another for Rome.
>
> *Anderson v. Nosser*, 438 F.2d 183, 190 (5th Cir.1971)

In sum, it is clear from concepts deeply rooted in our history, from the present state of the law, from the various sets of professional minimum standards and from the past a and present positions taken by the United States concerning state and local prisons and jails that the decision of the court below was correct and that the facts and issues raised in this case do not provide special and important reasons for review by this Court as is required by Rule 19, Supreme Court Rules.

## CONCLUSION

The writ of certiorari in this case should be dismissed as improvidently granted or, in the alternative, the judgement of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD I. KOREN
RALPH I. KNOWLES, JR.
MATTHEW L. MYERS
ALVIN J. BRONSTEIN
The National Prison Project of the
American Civil Liberties Union
Foundation
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-0500

*Attorneys for Amicus Curiae*